UNITED STATES

COMMISSION ON LAND CLAIMS

IN CALIFORNIA.

ARGUMENT

IN THE CASE OF

ARGÜELLO AND OTHERS,

CLAIMING RANCHO DE LAS PULGAS.

Made before the Board, July 18, 1853.

BY WILLIAM CAREY JONES,

OF COUNSEL FOR CLAIMANTS.

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In opening this case a second time, I come to it under different circumstances from those existing at its first hearing. Then, in consequence of decisions already made, I had only to take up the facts and laws applicable to them, of this particular title, without entering into the general topics discussed in connection with grants in this State. But the whole subject being now opened anew, it becomes necessary to preface the particular examination of the case with some general remarks.

It is with a feeling of deep regret, however, that I find myself compelled thus a second time to open the whole subject of titles in this State; obliged again to appear, in a contest forced by the Government of my country, to plead in behalf of rights which that Govern ment, is bound by every consideration of justice, honor and magnanimity, and by its pledged faith, not only not to invade, but, with its most vigilant care, to protect.

In an individual case of a land grant, whether this or any other, which the Government thought ought to be voided, and to that end had brought its action, I should say nothing of this sort, but address myself to the facts and law of the particular matter, as in an ordinary suit to try relative rights. But the argument to which we have now to address ourselves is not of this nature. It goes to the rights of property—the vested rights—of an entire people; to every acre of land claimed, and, till the advent of our Government, held, as private property in all California. For the first time, as far as I have been able to inform myself,—for the first time since law suits were known, the whole landed interest of a State has been thrown into litigation by a single process; and that in a manner to compel the real defendant to appear in the disadvantageous position of plaintiff. That this has arisen from a mistaken policy, and that it is the exercise of an arbitrary and altogether extra-constitutional power on the part of the United States, I have never had a doubt; but, feeling the weight of that power, we have submitted ourselves to its exactions; and only now ask the

benefit of the solemn pledges and promises which in connection with those exactions are made to us. I touch this topic now, however, particularly to endeavor to show that the position taken by the learned law agent, that the United States could, by means of this forced litigation, put themselves into a better condition than their vendor was in, is fallacious. By his own showing, the former Government could not re-grant (consequently could not reclaim) lands once granted, even when conditions had not been complied with, except by due process and investigation; and he might have added, that this process was and could be only by denouncement, i. e., by another person desiring the land and offering to put it to use; and still further, that even this denouncement would not be maintained, for the failure of any other condition, than the essential one of *use or occupation*. The Government gave its lands for use and occupation, and would not be cheated of that consideration; so, that if the grantee neglected to fulfil that essential condition—that moving cause of his grant—he was held after awhile to have abandoned his pretention; and, on another offering to meet the desires of the Government, was required to show cause for his neglect, or else his claim lapsed. But there cannot be shown a single instance of a successful denouncement, either of land or mines, for the failure of any other condition; nor even for this, if the grantee had used, or would promise, reasonable diligence to perform it.

Now, while the Law Agent admits that, under the Mexican Government, process must first have been commenced against the claimant, and he put only on the defensive; and while it is a fact, that no such process could have been sustained for the failure of any condition, except of that which defeated the object of the grant, he would persuade us that the United States is in so much better condition that she may rightly force on us the initiative, and not only this, but compel us to show affirmatively not alone the fulfilment of the substantial requisition of that use or occupation for which Mexico granted her domain, but a compliance with every trivial matter the caprice of the Governor (often of his clerk) might insert in the title.

The most that has ever before been pretended, is, that our government succeeded to the rights of her vendor, and might, in her political character, deal with grants here precisely as Mexico might have dealt with them. I am persuaded that she is not even in this position; that by the terms of the treaty all rights of defeasance are cut off; and that by the very constitution of our government, she cannot deal with these titles in her political capacity at all, except to fulfil her treaty stipulation, to maintain and protect their owners in their enjoyment. From an erroneous idea that she could do this, that she could deal with them in her political capacity, that as a sovereign, she could escape from her engagements, till she saw fit to give the judiciary power to enforce them, has arisen, as I think, that long train of mischievous legislation that has left land titles in Louisiana and Missouri unsettled for upwards of fifty, and in Florida upwards of thirty years, and that is not unlikely to leave California for an indefinite period, a prey to like confusion.

I stated that, in my opinion, the United States does not stand in relation to these titles in the same situation as Mexico, but that *by the treaty*, *by the treaty alone*, they stand perfected, and all rights of defeasance, even where Mexico may have had such a right, are by the treaty cut off. And I cannot understand that subtle idea that a treaty differs so from other compacts, that it does not execute itself; that though it may be binding in morals, it is not binding in law, till it be legislatively affirmed. Treaties are made by the political power of the government, as laws

also are; and to say they are not binding, not a rule for the judiciary, or within its cognizance, is only to say that a compact being mutually made, requires afterwards the separate consent of the parties to it for its enforcement; the absurdity of which, is still more apparent in a case where, as in the present, the rights of third parties are affected by the compact, and liable to be destroyed by delay in its enforcement. I read in the Constitution of the United States, that it and laws in pusuance of it, and treaties made under authority of the United States shall be the supreme law, and the judges in every State shall be bound thereby; in view of which, it seems to me to be as reasonable and logical to say that a law of the United States does not execute itself, till affirmed by a treaty, as that a treaty does not execute itself till aided by a law. Nor did the Supreme Court in former times hold any such idea, but exercised its functions in the interpretation and enforcement of treaties equally as in the interpretation and enforcement of laws, in whatever way the questions came before it.

But, if a treaty does require to be réënacted, in this case, we have that reënactment; we have the consent of the United States that the treaty with Mexico shall be considered in force; that if it were not before in a condition to be regarded, as the Constitution declares, by all the judges in every State, at all events by this Commission, and appellate tribunals, it *shall*, in these cases, be held as a rule of decision; and I shall consequently endeavor to show that all right of defeasance of any existing estate—any existing property—was cut off, and all estates made perfect and inviolable by the treaty, citing only the decisions of the Supreme Court.

In the case of Simms *v.* Irvine, 3 Dallas 425, Douglass acquired a right under the British government to five thousand acres of land for services in the French war. He assigned to Simms, who afterwards obtained a warrant from the State of Virginia, and located it on Montour's island, in the Ohio river. In determining the boundaries between the States of Virginia and Pennsylvania, this island went to Pennsylvania. Under Pennsylvania, Simms obtained a survey according to his warrant, but did not obtain a patent. Irvine, claimed under a statute of Pennsylvania, authorizing him to make a pre-emption on the island, and proceedings under it. The court held (opinion by Chief Justice Ellsworth) that Simms by his warrant from Virginia and location of it on the island, acquired a complete equitable title, and needed only a patent for a complete legal title; that a *confirmation* of this equitable title, AS COMPLETE AS A PATENT COULD HAVE BEEN, was conferred in the compact between Virginia and Pennsylvania, "reserving and confirming" rights previously acquired under Virginia; that the terms of the compact must be expounded favorably for those rights, so that titles before substantially good, should not, after a change of jurisdiction, be defeated or questioned for formal defects.

This was in the early days of the Republic, when that august tribunal was first organized, and a lofty sense of the dignity and responsibility of its position as the chief expounder of law and justice under an entire new system, and not only as between men, but as between States, still prevailed; whilst the stern conscientiousness, that characterized the heroic age and the heroic men of our country still likewise pervaded all branches of the public service; and while it was still a sentiment of the whole country that the judiciary had and ought to have no dependence on the political power.

Now can any one show, why this compact between the United States and Mexico, for the protection of private rights should be construed less favorably

for those rights, than the like compact between Virginia and Pennsylvania for the rights it reserved?

The terms of the compact between Virginia and Pennsylvania were not nearly so conclusive as the guaranty of the ninth article of the treaty with Mexico. "Reserving and confirming" rights might very well be construed to mean reserving and confirming them in the state in which they were found; but the stipulation to "*maintain and protect property*" is much more comprehensive, and it imposes much larger obligations, because so often declared by the Supreme Court, the term *property* as applied to lands, includes every description of estate, and maintainance and protection in it necessarily includes its perfectment.

The next case, I shall quote, is from 7 Cranch, 703, Fairfax *v.* Hunter, and this is not a case under a compact between two States of the Union, but precisely like the present, under a treaty between the United States and a foreign power—Great Britain.

Denny Fairfax, an alien enemy was devisee of Lord Fairfax of the property called the Northern Neck of Virginia; and in the year 1789 the State of Virginia patented a portion of the lands to Thomas Hunter. The suit was brought to eject Hunter.

The court held that though Denny Fairfax, being an alien enemy, could not have taken the land by descent, i. e. by operation of law, he took it properly by devise, i. e. by act of the party; but that he took it not for his own benefit, but for the benefit of the State; that from the time of the death of Lord Fairfax in 1781, down to the treaty of 1794, the State had, consequently, a right of entry into the lands, and by proper proceeding by inquest of office, to consummate their title. But that having omitted this proceeding, whether by mistake or design, prior to the treaty of 1794, the right of the State was cut off by the treaty; that the possession and seisin of the plaintiff continued up to and after the treaty of 1794, "*which* (i. e. the treaty) being the supreme law *confirmed his title to him.*

The clause of the treaty of 1794, (article 9), quoted in this case, is, that "that British subjects who now hold lands in the Territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them *according to the nature of their respective estates*;" language that might without violence have been interpreted that Denny Fairfax having, before the treaty, held this estate in trust for the Commonwealth, and liable to entry by an inquest of office, continued so to hold it. But the Court took cognizance of the treaty, according to its intent, and held that *it* confirmed the title of Fairfax, and cut off the right of forfeiture in the State.

Now I contend, that under the far more comprehensive and obligatory terms of the treaty with Mexico, by that treaty our titles here are confirmed, and whatever right of forfeiture or avoidance may have been in the State before the treaty, has (in the language of the Court) "*by the operation of the treaty*, become ineffectual and void."

What possible differences are there to take these cases out of that rule? The title of Fairfax was defeasible. Virginia, by patenting the land to Hunter in 1789, had shown a disposition and intention to assert her paramount title, but she neglected the necessary legal steps; so that, at the treaty, Fairfax still had an estate; the treaty stepped in, and cutting off the right of defeasance, by a promise of protection, made the estate inviolate. These claimants, admit for the sake of argument, held their property under Mexico by a defeasible tenure; but Mexico did not avail herself of her right in the premises; did not institute proceedings to that

end; and the claimants, at the time of the treaty, remained with their estates, not as before defeasible, but the right of defeasance cut off, and their estate made inviolate, by treaty stipulation of maintenance and protection. They are as much protected, as inviolably protected, as directly protected, and their defeasible estates as much made indefeasible, under the treaty of Guadalupe, as the estate of Fairfax was by the treaty with Great Britain.

I cannot agree, therefore, with the assumption, that in the acquisition of California the United States became substituted for Mexico, in her rights as well as her obligations; in all her obligations—yes, and more than all; but not in all her rights. Some of the titles in this State *were* defeasible under the former Government. Those which had never been submitted to the local Legisture, might still have been submitted, negatived, sent to the Supreme Government, and then finally defeated; those under which there had been no use or occupation, might have been denounced, (informed upon,) and after investigated, declared vacant. But until one or the other of these steps, a title remained in full vigor; and the U. S. did not succeed to the right of defeasance, because to "*protect and maintain*," is inconsistent with defeasance; but the U. S. did incur the obligation to relieve us from that modern fiction of the Courts, that our titles are not sufficient to oust an intruder on them; and this, I take it, is the main object for which we are here.

I say this *modern* fiction, because, the old Courts, and old practice had not invented it, as we have seen in the case in 3 Dallas, where by simple force of the treaty stipulation, an important grant was held perfected, and consequently sufficient for ejectment; and even as late as 11 P. 20 (Martell v. Silk,) the same is affirmed.

In that case plaintiff claimed under a right derived from the State of Virginia; defendant under a title from the state of Pennsylvania. Plaintiff entered on the land (in Western Virginia) in 1772, contrary to law, and consequently as a trespasser; but in 1779, the Legislature of Virginia recognized settlement rights in the plaintiff and others in like circumstances, and authorized them to enter a certain quantity each. The defendant claimed under a warrant from Pennsylvania, taken out in 1773, and surveyed in 1778. Afterward by the settlement of limits between the two States, the land came under the jurisdiction of Pennsylvania, and, by the compact, rights acquired under the States, respectively, were to be respected by the other according to priority. The Court held, that the case was, so to speak, an international one, between two States, and the *rule of decision to be the compact;* that Virginia by the act of 1779, had recognized the right of plaintiff as beginning in 1772, when he made his settlement; that that right, however inchoate and shallow, was protected by the compact; and the case was so decided.

Now it puzzles me to know how a compact between Virginia and Pennsylvania can, *propio vigore*, perfect an inchoate right; and yet more forcible language in a treaty between the United States and Mexico cannot; and how, by the mere operation of a treaty between the United States and Great Britain, a defeasable title can be confirmed, and a right of forfeiture become ineffectual and void, and yet stipulations of the United States with Mexico, cannot have that effect; or how a compact between Virginia and Pennsylvania can be "*a rule of decision*" for the courts, and the treaty between the United States and Mexico not be so. If it be said, that the Constitution directly confers jurisdiction on the federal courts in case of persons claiming land under grants from different States, I reply, that in the same clause it gives jurisdiction in all cases arising under

treaties between the United States and foreign powers.

I argue, then, that by the stipulation of the treaty, all titles and estates in California, every thing that amounted to the dignity of property—every thing that was respected as such by the common understanding—that was the subject of barter and sale; liable to be seized on execution; were promised protection and maintainance; that the United States in the acquisition of California, so far from reserving a right to take any advantage of infirmities of title, incurred a bounden obligation to cure those infirmities; that the treaty ought of itself to be a rule of decision in all courts, and be held to have accomplished these objects; but at all events, it is the rule of decision for this Board; the first and imperative rule, from which it cannot depart, and under which it must declare the confirmation of all subsisting rights; of all *bona fide* titles—by which I mean titles not simulated; made while the persons whose signatures they bear filled their respective places—of all legal or equitable claims to lands in California, arising prior to the displacement of the former government; of every thing that the usage and custom of the country respected as property.

Whether or not the laws of nations, or the principles of equity, would effect all this without the treaty, or the decisions of the Supreme Court would cover as much, can therefore make little difference. I plant myself on the treaty, which the laws of nations and the principles of equity, as well as those of justice and morality, require the United States to observe. This, in my opinion, is where the laws of nations and the principles of equity are to be invoked: in aid of the treaty; to enforce it.

The facts in this case, however, show a title complete in itself; and I should not argue the case at all, but for the attempt that is made to reduce the *limits* that belong to us. And, consequently, the only question to which I shall address myself, is: Does the Cañada Raimundo belong to the claimants in the case? as I do not suppose that the Government will question our right to all the remainder of our claim.

To this question, I shall take up the testimony that is before the Board in its order, beginning with the documentary, and endeavor to maintain that the Cañada is an integral part of the estate of the claimants, and that they are entitled to be confirmed in all the extent of the boundaries they claim.

First in date, is a report of Padre José Viader, Missionary of Santa Clara, made 26th December, 1827, in pursuance of a proclamation, or general order of the Governor, directing a return to be made of the occupied lands of the territory. This document exists in the original, in the archives of the former government, and thence is drawn the official copy before the Board. It is the report of a public functionary, in pursuance of orders from his superior; as such, was preserved in the archives, and was received and taken at the time as evidence of the facts stated in it, and therefore recorded as ascertained truths for the guidance of the Government.

By this report it appears, then, that the public or national establishment of the Mission of Santa Clara was bounded by the San Francisquito creek; that the then late governor, Sola, had established the creek as a common boundary between the Mission and the Rancho de las Pulgas; and that said rancho was at that time occupied by Don Luis Argüello, under a grant from said governor.

This is what Padre Viader reports: "The Sr. Governor Don Pablo Vicente de Sola, who wished to favor Capt. Don Luis Argüello, granting him the tract of Las Pulgas for his rancho, marked out as boundaries between said rancho and the lands of this mission,

the creek called San Francisquito, which on the north side runs from west to east, and enters into the estuary, and since that time the Mission of Santa Clara lost the best and most convenient tract for its rancho of sheep. The great for tune was, that said gentleman has permitted said sheep to pasture there, but without building any corrals, and even this will only last until he may determine upon denying his permission."

The necessity and cause of an order concerning this rancho, to be made by Sola, while it is in proof that many years before the time of Sola, the rancho had well established boundaries, and was in the ownership of the Argüellos, father and son, is explained in the facts developed in other testimony, which I shall ask attention to, viz: that shortly after it came into possession of Don Luis Argüello, i. e., about 1815, it was by arrangement between the owner, the Mission of Dolores, and the captain of the Presidio of San Francisco, temporarily turned over to the uses of the royal treasury, for the grazing of the public cattle, which continued till about 1820. During this time, as the rancho was in the public use, it would appear that the Mission of Santa Clara was allowed to pasture its sheep on the southern end of it. In restoring the rancho, therefore, to its owner, as Sola is shown to have done, by returning the royal cattle to the royal rancho at the place called "Burriburi," it was natural that in whatever new muniment of title should be issued, the southern boundary should be expressly declared.

It will be said, perhaps, that this document is not *proof:* but it is proof, and of a very high order. It is the testimony of a competent, and, at the same time, of a complaining and unwilling witness, and is testimony elicited by the Government. It is, moreover, made testimony by adoption of the Government, as the foundation of an official memorandum in its book of land registration. At least, as far as concerns the Mission of Santa Clara, this registry adopts the report, and although the part concerning the Pulgas is not said to be drawn from the report, the context would make it seem so. But whether or not, it is an official entry, and is to the same effect as the report, viz:

"Governor Don Pablo Vicente de Sola granted the tract of Las Pulgas to Captain Don Luis Arguello. He designated to him as boundary of his rancho and the Mission lands, the creek called San Francisquito, which, on the north side runs from west to east, to where it enters the estuary."

These two documents, then, prove, that by an act of Governor Sola, Don Luis Argüello had been put in possession, as his property, of the Rancho of the Pulgas; that this possession was recognised and concurred in by the Government of 1827–8, and acquiesced in and respected by those adjoining neighbors who had been thereby displaced. I go at present no farther back than this fact, that by concession, by an authoritative act of Governor Sola, the Rancho of the Pulgas had been withdrawn from the public use, and transferred to Arguello; and as the Supreme Court of Louisiana say in Sanchez *vs.* Gonzales, (11 Martin, 210,) "When a part of the public land is separated from the rest by metes and bounds, and an individual is put in possession of it, as his own, *he acquires title thereto.*" And I say, if our right rested alone on this, coupled with continuous occupation since, we should be here with a good title, whether tested by the principles of equity, the usages of the world which go to make up what we call the law of nations, by the common law, by the local usages of the country, or by the Spanish law.

By the principles of equity, an equity in the occupants would have been thus established, which any court of equity would have recognised. By the usage

of the world, all long occupation is recognised as conferring title to lands: in fact, in all old communities, nearly all titles rest on nothing else. By the common law, a presumption of ownership will arise from twenty years occupation, or even less, in all cases where it *could have had* a legal beginning, much more where it is shown to have had a legal beginning. By local usage, *any* authorized occupation, even that conferred by an alcalde, gave a right of entry, and ripened into title. And by the Spanish law, lands in new settlements once lawfully distributed, vested in absolute title after four years occupation. I refer here to l. 14, tit. 12, lib. 4. Leys de Indias.

When I have occasion to argue a case which rests solely on a Spanish title, I shall propose to go into an exposition of this and other sections of the Leys de Indias, relating to grants of land, but at present shall not occupy the time of the Board with that discussion. In my opinion, however, a fundamental mistake arises generally in our views of that body of legislation, from confounding two distinct branches of it, viz: that which relates to the *foundation of new settlements*, and that which relates to the sale and com position of lands *in the midst of colonies already established.*

The documents before us prove, also, another fact more to my present purpose. They prove the boundary of the Pulgas to have extended from the Bay to the Mountains, even in the broadest part of the tract, viz: that at the Creek of San Francisquito; and all authorities and reason agree, that when a creek or river is designated as boundary in general terms, the whole stream is meant, and not a part of it. In these documents, moreover, the whole stream is described, not merely mentioned in general terms, but the course of it, "running from west to east, and entering into the estuary." The context, too, shows that the monu tains formed one part of the boundaries of the Mission, and that from the mountains to the bay, the creek thus running, made the division between to lands of the Mission and those of Argüello, viz: Las Pulgas. I need not dwell on this, however, for in documents which I shall prosently bring to attention, it is curious to note how this point is guarded and covered by proofs cumulating one on another, without any interested agency to bring them together, and without any suspicion then existing that the fact would ever be questioned.

In immediate connection, however, with the report of Fr. Viader, and the entry in the book of lands, I will introduce another document, slight in itself, if its evidence stood alone, but still establishing that the tract we are claiming, was known to the Government as a pirvate estate, and as such to be registered when the proper documents should be obtained.

The book of Registration of Lands was made, as already stated, in pursuance of an order from Governor Echandea, for a general registration of lands. This order has not, as far as I know, been preserved, but the fact of its issuance appears in the manner in which the returns of land were made. Before it was completed, and during its progress in fact, Echandea was displaced from office. This change interfered with the making of the returns, and about a year after the issue of the proclamation, this slip seems to have been made to show what, within the knowledge of the Government, was still lacking for the fulfilment of the order, and completion of the requisition. It shows, then, that like many other proprietors, the owners of the Pulgas had not yet made a return of their estate; and this explains why there is not found in the archives a registration of the grant made to Luis Argüello by Sola. For though Sola, and his secretary, De la Torre, by many evidences we have, conducted their business

carefully and well, and though Sola made many grants of lands, there is no registration of them now extant. If a record of them were kept at the time, it has long since disappeared; and the same may be said in reference to the grants made by his predecessors: no registration of them appears.

As next in order of date, I come to the *espediente* of the original grant made to Maximo Martinez and Domingo Peralta. The Cañada or Valley of Corte Madera, which was granted to those citizens, is a continuation or extension of the Cañada or Valley Raimundo. It is full of pregnant meaning, that this espediente informs us in so many different shapes, that the tract called Cañada de Corte Madera had for one of its boundaries "the Rancho de las Pulgas, the property of Argüello." The original petition of these parties is dated 16th December, 1832, before the time of Figueroa, and the land asked for is identified as the Cañada del Corte Madera, lying between the boundaries of the Mission of Santa Clara and those of the late Captain Don Luis Argüello. How it came to be *between* the boundaries of the Mission of Santa Clara, &c., is explained by the fact that the original occupation of the tract by Martinez and Peralta, was by a permit from the head of the Mission, hence, when the tract was separated from the mision lands, the Mission had of course no new boundaries. On this petition, the military commandant endorses, that till the arrival of the Political Chief, then expected, the parties could occupy provisionally *the tract referred to*, i. e. the Cañada de Corte Madera, bounded by the Pulgas.

Accordingly, on the arrival of Figueroa in the following year, (1833.) the parties renewed their petition by reference to the description given in their former paper, and by a map, and on this Governor Figueroa, on 18th May, 1833, made his decree of concession, declaring the parties owners in fee of the tract called Cañada de Corte Madera, bounded with the Mission and the Rancho de las Pulgas. Again, on 10th June, 1833, the Governor issued, what has been called by way of distinction, his title in form, describing the tract with still more particularity, as bounded by the Mission of Santa Clara, the *Rancho de las Pulgas*, and the *Sierra of Santa Cruz*, fixing the locality of the tract, if it were not already fixed, beyond doubt, as a continuation of the Cañada Raimundo, and showing it to be impossible that it could have a boundary in connection with the Pulgas, unless the Cañada Raimundo were a part of the Pulgas, and the boundary of the Pulgas the same range of lofty mountains as is called in Martinez's grant, Sierra of Santa Cruz.

To this point, then, it is clear, that by common consent, by public opinion, by representations of adjoining neighbors, by official reports, by recognition of the government, *i. e.*, by all the circumstances that go throughout the world to make up titles to lands, the Cañada Raimundo was a part, and the creek of San Francisquito in its whole course, and the sierra or mountain ranges were boundaries, of the rancho de las Pulgas, and that rancho the property of the Argüellos.

If this evidence, however, be said to be in some degree incidental or inferential, it is not less convincing, and not the less that kind of testimony that all courts will take notice of to establish identity and limits, and to sustain ancient possession, and ascertain a rightful and lawful beginning for such possession.

It is next to impossible that the priest of Santa Clara should have reported against the fact, in representing Don Luis Argüello as holding the tract of the Pulgas by virtue of a grant from Sola, and next to impossible that he should not have known and truly re-

ported the boundary which separated that tract from the lands under his own charge. All his interests and feelings were enlisted against Argüellos' occupation, and against the establishment of a long line like that of the San Francisquito for its boundary.—Had either, therefore, been wrongful or contestable, it is certain that Padre Viader would have known it, and complained of the occupation as a usurpation, rather than of the grant as an act of favoritism.

So, also, unless it were a notorious fact, or a fact within the direct knowledge of the government, that said Rancho de las Pulgas was the property of the Argüellos, and that the San Francisquito was its boundary, we should not expect to see it so stated in the Book of Registration of Lands.

Neither, unless this was also the fact, could we expect Martinez and Peralta, both citizens "to the manor born," and inevitably acquainted with all the localities and ownerships of the district, could we expect that they would erroneously designate and locate the tract they were petitioning for. It would be arguing against common sense, that these citizens should be supposed to speak in the premises either ignorantly or falsely; or that, if there were any doubt of the fact as the petitions represented them, that the government in its part of the proceedings should have blindly followed the words of the petition, and so recognised a private ownership and a boundary that did not exist.

With this uniform and concurrent testimony, then, to the point under consideration, we shall come well prepared for the important and *direct* positive testimony presented in the document next in order of date—that is, the Expediente, or record, furnished from the archives, in the matter of Alviso, asking for a grant of the Cañada Raimundo.

If it be said that the notoriety which we claim for the ownership of the Pulgas, and of the fact that the Cañada Raimundo was a portion of the tract, ought to have prevented such an application as this of Alviso's,—to have warned him in advance of the futility of asking for the Cañada, it being already private property, I reply that Don Luis Argüello had been then four years dead, leaving a widow not accustomed to business, and children only of tender years; his eldest son Francisco being also deceased; and it had probably become known that the papers of possession were, by some casualty, no longer in the hands of the family; and it might have been thought that advantage could be taken of the circumstances to cut off that portion of the estate. Whatever the motive or calculation of the petitioner, however, in soliciting the land, it was disappointed by the just view which the government took of the case, on the evidence adduced; and if any doubt had before existed of the ownership of the Cañada, it was removed.

This Expediente begins with a petition from Alviso to the Governor, for a grant of the tract of land named the *Cañada Raimundo.*

By the law of 1824, lands were grantable, which, not being private property or pertinent to any settlement or corporation, might be colonized; and by the regulations of 1828, Governors of Territories conformably with said law, were authorized to make grants in such vacant lands; and were directed to inform themselves as to the propriety of the grant, in regard to the laws, and in regard to the qualifications of the petitioner. On receiving the petition of Alviso, therefore, it became the duty of the Governor to ascertain, first, whether the tract asked for was private property; for if it were not government land, of course, whatever the merits of the applicant, his pretension fell.

Accordingly, this inquiry was made, in the usual form, and of the functionaries most likely to be informed, as well

as the ones designated for that object, by the third section of the Regulations, of 1828, that is, of the nearest public officers, the municipal council of San Francisco, and the Commissioner or Administrator of the Mission of San Francisco de Assis, or Dolores.

The reports of these functionaries represented the claims of *the petitioner* in the strongest light, and unexceptionable; but concurred in the declaration that the land was private property, namely, as *belonging to the Rancho de las Pulgas, the property of Doña Soleda de Argüello.*

It is true, the Ayuntamiento of San Francisco add, that they understood *extra-judicially* that the cattle of that rancho did not pasture as far as the Cañada. But the effect of this remark is to show that their *inclination* was to have reported against the claim of the Argüellos, and a predisposition to bring in any thing they could to weaken the force of what they were obliged to say of the ownership of the land: and hence that their report is rid of any imputation of partiality for the claimants. It also proves another point, viz., that their knowledge in regard to the ownership was *judicial*, since it was *extra-judicially* that they learned of the extent to which the cattle of the rancho pastured. This remark, then, so far from weakening the report in the particular we are considering, materially strengthens it.

At all events, the Governor took their *official judicial* information for his guide, in preference to the rumors they unnecessarily interpolated into their report; and by a decree, having all the force of a judgment, declared it to be ascertained that the tract in question belonged to Doña Soledad, and hence that the petition of Alviso could not be allowed—could not *have place;* a strong phrase, signifying that the petition had *nothing to stand on.*

What is the effect of these documents? In the argument of the case of Cruz Cervantes, it was contended, on the part of the Government, that each particular fact found by the functionaries to whom a petition for lands should be referred, was to be taken as *res judicata.* As *against the Government*, I believe this doctrine to be correct; at all events, that when the Governor *acted on the information*, conformed his decision or judgment to the finding, that then the subject matter became *res judicata*—a thing adjudged. The Supreme Court of the United States have likened such informations to an inquest of office at common law. In Mitchel's case (9 Peters, 711), the claimant held under a grant from the Governor of Florida, of lands in the occupation of the Seminole Indians. The grant was conditioned, that the grantee should not alien the lands without consent of the Government. In 1817, the grantee applied to the Captain General of Cuba for this consent. The Captain General referred the matter to the Assessor General for his advice, and he reported that the lands had been lawfully granted, in full property. On this report, permission to dispose of the land was given. In the hearing before the Supreme Court, it was contended on the part of the United States that the lands being Indian lands, the grant was not within the functions of the officer making it, and was consequently void. The Court held, that the proceedings before the Assessor General were in the nature of an inquest of office, in analogy to the writ of *ad quod damnum*, which by the common law precedes the grant of any charter or patent by the king, and that the report of the Assessor General being acted on by the Captain General, as on an inquisition at common law, the Court would not go behind it.

In the case before us, Alviso asked for a donation of the tract in question, under a law which entitled him to a share of the public domain. The Governor referred the matter, not to the

Assessor General, because there was no such officer here, and because it was not a question of law, but questions of fact he was to determine. He referred it therefore to those functionaries best enabled to give the desired information, and they reported to him a state of facts in regard to the *petitioner*, which would have inevitably caused the grant to be made had the land been grantable. The Governor acted on that report and gave his judgment against the grant, on *that single ground*, viz: that *the land was the property of the widow Argüello.*—How can we go behind that decision—that judgment? On what ground?—Did either of these functionaries exceed his authority? Surely not, since it was the business of the magistrates to report, and the business of the Governor to judge. Both acting in the precise sphere of their duties, how is it possible that their acts were otherwise than conclusive? The Supreme Court say, in the case just quoted, that they would not go behind the acts of the Assessor General and Governor, to presume *that they had exceeded their powers*, much less, their powers being established, to question the rightfulness of its exercise. Here we are quite willing to go behind the record and examine the powers of the officers; but, that being done, I submit that that power being ascertained, (for which a reading of the Regulations of 1828 will suffice,) the rightfulness of its exercise must be admitted, since of this the officers themselves were the sole judges. Suppose the decision had been different—sup pose the Governor had decided that no valid objection appeared to the granting of the petition of Alviso, and a concession had consequently issued, would not that have been binding on the Government? Could the Gov ernment afterwards have ignored its own act, and resumed any portion of the land? The owners of the land might have protested. The Argüellos might still contend that the lands embraced in the patent to Alviso were their property, and insist on a further investigation, and if they could find a tribunal competent to hear their appeal, still perhaps have obtained a reversal of the judgment. So I will not say that Alviso, had he thought proper, might have prosecuted the inquiry further; and if he could have found a tribunal competent to hear his appeal, still have demanded further investigation; for, undoubtedly, both by law, usage, and the principles that lie at the bottom of the distribution of public lands whether it be *pre ference*, *pre-tension*, i. e. *pre-holding*, as in most goverements, or *pre-emption*, as in ours, he, Alviso, had by his pretension and petition, a certain interest and right in that land, if it had been public domain; precisely as if, in the case quoted, (Mitchel's case, 9 P.,) the Assessor had reported against the validity of the grant to Forbes, and the Governor General had consequently refused the permit to sell. Forbes, perhaps, would not have been concluded. He might have appealed to the *Audiencia*, or to the Council of the Indias, or to the King. But the Government was concluded—the act of its appointed officer, within the sphere of his duties, concluded it. So, I contend that in this action, in this judgment of Castro, the Government was concluded—forever debarred from setting up any claim to the tract of land in question—forever debarred from questioning the right in it of Doña Soledad, and those she represented.

If it be said that the Ayuntamiento of San Francisco and the Commissioner of Dolores Mission may have erred in their reports; that the evidence before them was not sufficient to warrant their reports, and that the governor was misled; I reply, that there is no means of ascertaining, at this time, what evidence they had before them, since they did not report the testimony, but only their verdict, which was the result of it; and that of the materiality

and weight of what they reported, the governor was the sole judge. But I go further, and I say, that without seeking for testimony outside the reports of the Ayuntamiento and Commissioner, but taking their reports as mere *dicta*, there was quite enough in them, if not to determine the mind of the governor, at least to put him on further inquiry. And accordingly we find that on receiving the reports, he directed the record to be served on Doña Soledad for such representation as she found expedient. And the answer which she made, being uncontradicted, and also corroborated by the reports already before the governor, contained facts quite sufficient for his decree, and on which, if they stood alone, I venture to say, no tribunal in Christendom could have based a different judgment. Different—very different—*modes of proof* might have been required of the facts, in other tribunals; but on the facts themselves, once proved, the laws of every country that boasts a jurisprudence would have compelled a like decision. *A possession of forty years, with the governmental sanction, and with an intermediate act of special governmental recognition, and with an assertion of title, was the state of facts before the governor, and on which he made his decree.* Forty years is the period of what is called *just prescription*—of immemorial custom—in the Spanish law, and works an absolute ownership of anything that *can* be made the subject of private dominion, and twice the period in which an English Court will presume a grant from the crown, or if need be a private act of parliament, in favor of any possession which *could have had* a legal beginning. (6 East. 215; 7 Wh. 59; 1 Febo. Mexo. 351.)

How, then could the governor have declared otherwise than that *from the steps taken*, IT RESULTED that the Cañada was the property of Da. Soledad; and these facts proved according to our more exact mode of proof, how could this Board, or any other tribunal, decide otherwise? Prosecute the enquiry as far as we may; go behind the acts of the governor to question his powers; go behind his ascertained powers to question their exercise; and this judgment is still unweakened, is correct, and is conclusive.

I liken, then, this information to the verdict of a jury, or the report of a Commissioner; which, when adopted by the court, becomes the final finding in the case, at least as against the government.

As to the functions of the Governor, he was vested with the entire political and highest judicial authority of the territory, there being then no exclusively judicial tribunals; and he was, moreover, vested with entire jurisdiction in respect of lands. His decision in the case, then, was not only a declaration by the political authority, that the land in question was not Government domain, but the property of the Argüellos, but also a *judicial finding;* a judgment of the highest tribunal of judicature, to the same effect.

The proceedings in this case were not *exparte*. The application of Alviso, with the reports of the Ayuntamiento and of the Commissioner of Dolores, were forwarded to the widow of the deceased Argüello, that she might put in her answer. And she accordingly, by the executor of her husband's will, and tutor of her minor children, by Estrada, her agent, maintained her claim, and declared the facts on which her right was founded. All parties then were heard in the case. —Alviso, by his petition; The Government, through its sworn Magistrates; The Heirs of Don Luis, through a competent representative.

The case was decided, then, after a full hearing and consideration. Had the decision been wrong, surely Alviso would have found means to shake it, while it was yet fresh, and if founded in a mistake capable of being rectified. But we do not find that he made any

attempt to do so; but that with the judgment of the Governor, the case dropped. I say that, then, it became a judgment irrevocable. It was a case where the commissioner reported; where the judge accepted and acted on the report, and confirmed it, and no rehearing or appeal was asked. It was a case where, prior to the judgment, all the facts were known. It was a *decision*, with competent information, due consideration, ample hearing, by the officer whose province alone it was to decide.

Can the Government, then, gainsay this adjudication? Can the Government, after having heard its own witnesses; after having called the party to defend her rights, and heard her humble representation; having, in view of all, declared those rights to be well founded, and adjudged them in her favor: can or could the Government afterwards go behind its own adjudication thus rendered, and ignore it? The widow and heirs of Argüello were made parties to the litigation by the Government, put by the Government on the defence of their claims: and it did not and does not lie in the mouth of that Government, or of its successor, or of any one claiming under it, or any one whose claims were not then *in esse*, to go behind that judgment and disturb it. There is no pretence that it was got by fraud or through mistake; and, as far as the Cañada Raimundo is concerned, if our right to it depended exclusively on this judgment, the United States would be bound to recognize our right, and confirm our claim, on the same ground that they would be bound to respect any adjudication by a competent tribunal of the past Government. There is no equivocation about the decree. It is explicit that "*from the steps taken, it follows* that the tract solicited, (i. e., the Cañada,) *belongs to Doña Soledad de Ortega.*

This decision is not *a grant*. It is not the creation of a right. It is the recognition and confirmation of an existing right. Not a creation of ownership, but a declaration of ownership already existing: a declaration by the Government succeeding the Spanish Government, of a right acquired during the time of the latter,—as the holders of rights acquired under Mexico now apply to the Government which has succeeded that, for a recognition and confirmation. And as this Government, after having recognized such a right, cannot gainsay its own action, so neither could the same or a succeeding Mexican Governor, or can the American Government now, negative this adjudication.

It will be recollected that this adjudication *is of the very locality now disputed about*. Not of the question of title to the Rancho de las Pulgas; that does not appear to have been questioned at all; but of the pertinency of this particular valley, the Cañada Raimundo, to that Rancho and of its (the Cañada's) ownership. Without, therefore, going at present into the question of the general title, it will be perceived that *the subject matter of the whole controversy now before this Board has been already, more than seventeen years ago, investigated, and adjudicated.* And unless this Board can be constituted into a Court of Appeals from the former decisions of the Mexican tribunals; and unless appeals will lie from those tribunals for an indefinite time—that is, forever—I do not see how this revival of the controversy is to be sustained.

"A decree of a competent Court of the highest jurisdiction is final and conclusive."—3 Dal., 54.

"A judgment or decree of a Court of competent jurisdiction is conclusive whenever the same matter is again drawn into controversy."—6 Wh., 109.

"A judgment of a Court of competent jurisdiction, while unreversed, concludes the subject matter of it as between the same parties."—9 P., 8.

"Where a particular authority is confided in a public officer to be exercised in his discretion upon an examination of facts

of which he is the appropriate judge, his decision on those facts is, in the absence of any controlling provision, absolutely conclusive." 3 Sto. C. C. R., 740.

We claim the benefit of these undoubted principles. We claim that the question of "parcel or no parcel," as applying to Canada Raimundo, and whether it be a portion of the Pulgas estate, is settled, and cannot be revived; that the question of its ownership is likewise fixed and cannot be disturbed; that the subject matter of this contest has been decided by the proper officer, by a competent tribunal, and cannot again be drawn into controversy.

Should it be objected that the parties to that dispute and the parties here are not the same, I reply that they are identically the same. The question there was with the Government: it is here with the Government. The question there was, whether the Cañada Raimundo was public domain, or private property: it was decided to be the latter. It was decided to be the property of the Argüellos, as against the Government,—consequently, as against any person claiming under the Government. So, whether our adversary here be held to be the Government or the representatives of Coppinger, or both, it is still nothing but an effort to upset that old decree, that old judgment, because Coppinger claims under the Government, and cannot come in till the Government has first negatived its own action. The controversy is, therefore, still the same. In 1835, was the Cañada Raimundo parcel of the Rancho de las Pulgas? was it public domain, or property of the Argüellos? In 1835, it was decided to be parcel of that Rancho; and to be the property of the Argüellos. Unless, then, the the present junior claimant claims otherwise than from the Government, it is the same subject matter, the same parties, and the same controversy; and all these I claim to have been, in the decree on which I have been commenting, forever and conclusively settled in favor of our clients.

I will now take up the record of proceedings instituted on the application of Estrada, for the issuance of *new muniments of title* to his wards. It will be recollected that in his representation made to the Government on the petition of Alviso, Estrada signifies his intention to present such an application. This petition, then, which he presents on the 27th October, 1835, is in pursuance of that notification. It is to be borne in mind, then, in the outset, that this proceeding was got up *with reference to the Cañada*; i. e., in consequence of the attempt upon the integrity of the rancho in that portion of it. Accordingly, we find Estrada was careful in his application to designate the exact boundaries of the rancho, and to include by name the Cañada Raimundo. He asks for the proper title to be issued in favor of said heirs, regulated to the adjoined map, that is, "*from the Arroyo of San Mateo to the Arroyo of San Francisquito, and from the Esteros to the Sierra.*"—Turning, then, to this *adjoined* map, we find all those objects laid down; the *lomeria baja*, or low hills; the Sierra, or mountain range, with the Cañada Raimundo and the Monte Redondo, lying between them. There is no mistake, then, as to what Estrada asked for. In his representation on the petition of Alviso, he declared the Cañada Raimundo to belong to his principals; he was led to this petition for new muniments of title in consequence of the attack on that portion of his principal's property. He includes it now by delineation and name, in the map which is a part of his petition.

On this application, the Governor directs, in a marginal note, that it shall be passed to the Alcalde of the Pueblo of San Francisco, for an information to be taken of *three competent witnesses* to several points, the important ones of which are: whether *the lands mentioned in the petition* had been

conceded to Don Luis Argüello, and how long; if he and his children had cultivated and settled on it; what was the character of the land, its extent, and *boundaries*.

We are authorized to draw from this gubernatorial decree, these conclusions:

1. That the Alcalde mentioned was competent to take the information asked for.

2. That the facts to be inquired into were proper to be proved by the testimony of witnesses.

3. That the testimony of three witnesses was sufficient to establish the facts to which they should testify.

This was on 27th October, 1835, at Monterey, and accordingly on the 11th November, at the port of San Francisco, the Alcalde of that jurisdiction, in pursuance of said gubernatorial decree, called before him successively, the citizens José Sanchez, Juan Miranda and José de la Cruz Sanchez, to testify to the enumerated points.

We are authorized to conclude, from this proceeding, that these three citizens were *competent witnesses* to those points; that their testimony was properly taken, and consequently that the facts to which they testified were legally established by competent proof.

Let us see, then, what is the testimony, noting that it is taken in view of Estrada's petition and map, and as a continuation of the proceedings thus begun.

They all agree in these main points: that the tract described by Estrada, in his petition, had been in the possession, since the time of Governor Borica, first of the late Don J. D. Argüello, and afterwards of his son, Don Luis, the father of the present heirs, continuously, with the exception of about five or six years—that is, from 1815 to 1820, during which time it had been, by a loan from Don Luis, occupied for the pasturage of the cattle of the royal hacienda;—this, however, being likewise the occupation of Don Luis, since it was by his consent; that from 1820, it had been constantly occupied by Don Luis to the time of his decease, and since that by his successors; that the boundaries of the tract were from the creek of San Mateo to that of San Francisquito; the bay and the mountain range.

The precise words used by them respectively are: by Don J. Sanchez, "that the boundaries which he has known for the tract, are, the creek of San Francisquito at the south, that of San Mateo at the north; and from east to west the estuaries, and the hills which are at the west of Monte Redondo and Cañada Raimundo. He does not use the word *sierra*, but by description, makes it even more certain what range of hills he means; the hills which are at the west of the Monte Redondo and the Cañada Raimundo—from east to west, the estuaries, &c.; that is, the estuaries for one boundary, and, at the side opposite the estuaries, the hills beyond the Cañada and the Monte Redondo.

José de la C. Sanchez, says that the boundaries, which he has been acquainted with of said rancho, are, the two creeks from north to south, and the estuaries and the sierra from east to west.

Miranda gives the same boundaries, designating the western limit as the sierra of the Cañada Raimundo.

José Sanchez and J. Miranda are dead; J. de la C. Sanchez is living; and if the Government had desired to question the accuracy of his testimony, or to bring any new facts, they might easily have brought him to the stand.

I hold it, then, to have been absolutely proved on this occasion, that the tract known for 40 years (now near 60 years) as the Rancho de las Pulgas, was the same tract, with the same boundaries as those now claimed; that Don Luis Argüello had received this tract from his father, and after himself possessing it for fifteen years, had left it to his heirs.

With this petition and this testimony

before him, what does the Governor do? He at once recognizes the imperativa right, not less than the meritorious claim, that has been shown him, and on the 26th November, 1835, issues his decree of concession—that decree of which the law speaks; and he declares, *in view of the petition, and of the information of three competent witnesses*, and in conformity with the laws and rules, the orphan heirs of the deceased Capt. Don Luis Argüello to be the owners in property, (owners in fee, as the learned law agent would say,) of the *tract known with the name of Las Pulgas*. He adopts the description given in the petition; he adopts the report of *three competent witnesses;* he adopts the name, and all that the name carries with it, and declares the children of the deceased Argüello owners in fee of the whole. I need not argue that no particular *form* is required for a grant; that a clear expression of the intent to grant is all that is necessary. No form is prescribed or contemplated, either in the Colonization Law of 1824, or the Regulations of 1828. In the Regulations of 1828, the Governor is simply authorized "to concede lands;" no distinction is made, as indeed there is no distinction, between concession and grant. The distinction that has been attempted to be drawn here, is therefore idle and futile. If the words do not mean the same thing, if they are not convertible terms, it is the misfortune of all of us, for at most, the Governor has no other power than to make *concessions*, or what is used as equivalent thereto, in another section of the Regulations, "*to accede or not*," as he shall deem proper, to the petition. I say, therefore, that whether on general principles, or under these special Regulations, in whatever way the Governor expressed his intention to *accede* to the prayer of the petition, he therein and thereby made his concession—conceded the land, and exhausted his discretion; not *his duties*, as I shall hereafter show, but *his discretion*.

In the case of Smith T. v. U. S., 4 P. 511, the grant consisted of a single word—"*concedido*," conceded, or as it is translated in Peters, *granted;* from which we may flatter ourselves that it has taken a wiser generation than flourished in the time of 4 Peters to find out the distinction between a grant and a concession; for in this case, the Supreme Court held that this single word *conceded*, written at the bottom of the petition, and signed by the granting officer, was sufficient to convey a complete title, if it had had reference to a specific object. So, I say, that had Governor Castro, without other ceremony, written at the bottom of Estrada's petition, the single word "concedido," or as his successor, Micheltorena, often did, "*conforme*," I agree, or agreed, it would have been equivalent to any formal writing; it would have been *acceding* to the petition, that is, *conceding* the land;—that is, parting with his whole discretion in the case in favor of the petitioner, whose rights thus acquired, he could not afterwards reduce or limit.

But I do not intend to be understood, that the instrument thus issued by Castro was informal. On the contrary, it contains everything that the most formal or technical rule could require.

It sets forth in the preamble, its moving cause, its basis, its view. "*In view* of the petition with which this *record* begins;" thus making that petition and all that follows, a part of itself. In view of the whole ground—considering everything that relates to the matter—considering that the petition claims as the Rancho de las Pulgas all that lies between the two creeks, and between the bay and the mountain crest; considering that three competent witnesses have thus likewise declared it; in special view of these facts, and in conformity with the laws and rules, he declares, (in the present tense,) the fee of the tract thus

petitioned for and thus testified about, to vest in the wards of the petitioner, reserving, however, a single condition, viz., a reservation of the approval of the Deputation. This reservation, be it noted, is not of any further power or discretion in himself; but reserving the approbation of that body who had the power of a qualified negative upon it; a reservation the law would have made if he had not: so that the decree, is in fact, as far as the Governor is concerned, an unconditional grant, in the present tense, and conferring, as far as he could confer it, an instantaneous vested right.

For the purpose of the legislative approbation thus reserved, the Governor goes on to direct that *this record* shall be forwarded to the Deputation—*este expediente:* THIS RECORD, that is, the petition and accompanying map of Estrada; with its marginal reference, and the testimony taken in pursuance of it; and the Governor's concession, based upon and adopting all the proceedings. With all this before it, and on all this, the deputation accordingly took action. On the 5th December, 1835, they referred it to their committee on vacant lands—committed the whole document; the whole record. And on this, on the 10th of the same month, the Committee report, in the outset showing that it was in view of all that had preceded—in view of the entire record; with a full knowledge of what was claimed, and what consequently conceded, declared that they found no objection or hindrance to the concession; that it was in all respects conformable to law, and recommending the passage of this resolution: "Se aprueba la concesion hecha á los huerfanoes del finado Don Luis Antonio Argüello, solicitado por su tutor C. José Estrada al terreno nombrado las Pulgas, concedidos en 26 de Noviembre de 1835, sugetandose á las condiciones que se estipularan." (I approved, the concession made to the orphans of the deceased Don L. A. Argüello, petitioned by their tutor citizen José Estrada, to the tract named las Pulgas, conceded 26, Nov. 1835, subject to the conditions that may be stipulated.)

There can be no mistake as to the identity of the place and limits here intended, with the place and limits intended and mentioned in the petition, delineated in the map, and testified to by the witnesses; with the place and limits so often mentioned and described throughout the espediente, or record, with which the committee was encharged, and on which they reported. The concession and resolution of approval both intend that place and those limits, or they intend nothing. They go back by relation to the petition and map, to the ancient possession, to the boundaries known (*conocidos*) and proved.

The same day that the committee report this resolution, the Deputation take it up and adopt it; that is, they approve the concession made on the 26th November, 1835, (designating it by date,) of the tract named Las Pulgas, solicited by Estrada, in behalf of the heirs of the deceased Argüello.

On this proceeding, I maintain that these heirs received a title, definitively, absolutely, irrevocably binding and valid; definitively valid and binding, without reference to any thing previous, not to be impaired by anything that followed; that by the concession made 26th November, and the approbation *thereof*, 10th December, the law was satisfied; the title to all the lands included in it completely out of the Government, and out of its power; that no other proceedings previous, subsequent, or intermediate, could add to its force, or more completely vest the grantees, or divest the grantor.

As the Supreme Court say, in Maybury's case, 1 Cr. 137, some point of time must be taken, when the power of the Executive, over an officer not removable at his will, must cease; so some point of time, I take it, must be,

when the power of a granting officer ceases over a grant not revocable at his will; and if that point of time is not the instant that he has passed from his hands to those whose action is then alone necessary for perfecting it, the instrument conferring title, at what point of time can it be fixed?

Let us examine the Regulation of 1828, and see what are the processes under it of conferring absolute title.

The first section confers on the Governor the granting power—that is, authority to concede lands; the 2d and 3d sections describe the steps to obtain such concession: the first being a petition or memorial asking for the grant. The 4th section prescribes what the Governor may or may not do, in the premises. He *shall accede or not, to the said petition.* Here he has full discretion; nobody denies it. It is not a discretion intended to be arbitrarily exercised, but still an absolute discretion. He shall accede or not to the petition; i. e., he shall make the concession asked for, or he shall not make it; for that is certainly the sense in which the words *accederá ó no*, are used; so that, in whatever way he *accedes to the petition*, he thereby makes the concession—concedes the land—as will fully appear in the 5th section, which prescribes how those concessions shall be made *definitive* or *absolute;* that is, beyond the chance or the power of negation. These processes are a continuous series. First—The Governor is authorized to grant lands to those who petition for them. Next—They who wish to become petitioners, present their memorial;—whereupon the Governor informs himself of the facts, and (Sec. 4) in view of all, makes the concession or not, at his full discretion. But this is the last point at which he has discretion; for, the concession being made, it SHALL be passed, with all relating documents, to the legislative council. This council, again, have a discretion in the case. They can consent, or not, to the concession being thenceforth definitive. That consent given, however, the grant does become definitive, and absolute beyond control. But though they have power thus to make the grant absolute, they have not power to destroy or annul it; for, not obtaining their consent to its *definitive validity*, the Governor SHALL refer it to the Supreme Government for its resolution; so that, the concession being once made, not only the Governor alone cannot annul it, but both he and the deputation together cannot; since, their approval failing, he must appeal on behalf of the petitioner to the Supreme Government. By the mere act of concession, therefore, it follows that the grantee acquires a certain vested right, defeasible, but defeasible only in a certain way, viz: by the joint action of the deputation and of the Supreme Government. The Governor himself cannot take it away; the Governor and deputation cannot; only the Deputation refusing its consent to the concession, and the Supreme Government conforming its action to the refusal of the Deputation. And this, where the grant is a *pure donation.* How much stronger the principle of indefeasibility, where, as in the present case, the concession is not the creation of a new property, only the confirmation and recognition of an old.

The governor, up to the time of making the concession, is vested with discretionary powers. But thenceforth his duties are merely ministerial. After making the concession, it is his duty to send it, with all the records of the case, to the Deputation for its action—his *duty*, not discretionary, but peremptory. After the affirmative action of the Deputation, then, he has a new duty to perform; not with regard to the concession: that has been perfected; made definitive; absolute; but to furnish the party with an evidence of it for his convenience and security. This duty is prescribed in section 8,

which directs that *the concession* which is asked being definitively made, *a document* shall be issued, signed by the governor, which shall serve as a title, &c.

This document is not intended to confer title; that is conferred in the concession, and definitively conferred when the concession is approved by the Deputation. The duty of issuing it is merely ministerial; and its purpose when issued, is to place in the hands of the party a convenient testimonial which he can manifest to the world, that such a concession has been made to him. The language of the law, as well as the definition of the word itself, shows, that it is the *concession* that is intended to confer the right of property. The governor is authorized to *concede* lands, that is, to distribute the public domain in ownership. The concession being made by him shall not be definitively valid, without the previous consent of the Deputation, then *with* that consent, it would, of course, be definitively valid. Valid as what? Binding as what? Valid and binding as *a concession*—a concession of lands; a grant out of the public domain to an individual; definitive and binding as a release of the public right to such portion of the national land. Being definitively made, *the concession*—the concession asked for—the concession of lands—the divestment of the public right—a *document* shall issue, a despatch attested by the governor's signature; for what? to *serve* as title to the party; and to express and explain to him that the *concession*—not this *document*—but the *concession*, should be understood by him in conformity with the laws.

Again, in section 9, "Of all petitions presented, and concessions made," a corresponding *record* shall be kept, with the maps of the *lands conceded*; and an account of the whole be passed periodically to the Supreme Government.

All these latter clauses are directive; and the duties they prescribe ministerial. It is no more the duty of the governor to issue this document, signed by him, to serve as title, &c., than it is his duty to cause a record to be kept; and as both relate to the concession, one intended for the information and use of the party, the other for the information and use of the government, he could with as good right vary the *record* from the concession, as vary this ministerial document from the concession.

There may be cases where the making of the decree of concession, and the issuance of a document to the party, were simultaneous acts; the difference not material; and where the party, by accepting the document and holding under it, may be supposed to have consented to its terms; but where *minor heirs*, as in the case before us, were concerned, neither they nor any one for them, could consent to a limitation of their property, whether held to have been theirs before the concession, or to have been acquired by the concession.

Let us look narrowly at the circumstances of this case. The concession is made on the 26th November, the approbation is given on the 10th December, referring to that concession by its date. Both are founded on an ascertained long prior possession, with claim of title. Both express definitively and clearly, the thing they allude to; express it by name, and by relation to the preceding documents which describe it. There is here everything necessary to a grant: a grantor, a grantee, a thing granted; the letter of the law fulfilled in all the processes of it, and the final action contemplated by the law, had for its perfection.

Taken alone, then, there could not be two opinions as to the force and effect of this definitive concession.—No one could doubt, that by the concession and its approbation, the grantees got a perfect, indefeasible title.

But another document has been dis-

covered –an extract out of the Archives, dated 27th November, 1835, which at first glance would seem to show, that the Governor, having declared the whole Rancho de las Pulgas to be the property of the infant Argüellos, on the following day repented him, and determined to resume for the Government a piece of said rancho. I say, at first sight it would so appear; and this is the view I took of it when I saw this record in the archives. But, attracted by the extreme importance which was attached to it, I examined the document more critically, and I do not see how so much hope and comfort can be derived from it.

In the first place, if it has any effect on the title, at least in so far as it differs from the concession, it is void.—Secondly; It does not differ from the concession in any material point, except in a misrecital, an inaccuracy of description, which, whether accidental or designed, could not be used to destroy a right; and I believe it much more consonant with the circumstances of the case, to suppose the misrecital to be an inadvertence or a clerical error, than to suppose it intentional. This misrecital consists in the insertion of the words Cañnda Raimundo instead of the Sierra at the west of the Cañada, or others equivalent; and that it is a mere misrecital (and mere surplusage, also) I shall demonstrate.

First: it will be borne in mind, that only about six weeks previously, the same governor had adjudged, on a full hearing, that the Cañada Raimundo was a portion of the Rancho de las Pulgas; that it was in consequence of the claim created in the Argüello family by an attempt on the integrity of their estate at that particular locality, that the present proceedings were instituted; that all the testimony taken in the premises, so far from raising any ground to question the correctness of the governor's decision in the matter of Alviso's petition, was positive in support of it; that the concession (and this present document also, as we shall see,) does not profess to be the creation of a new right, but the recognition and confirmation of an old; and that all the testimony before the governor showed that that old right was coëxtensive with the limits then and now claimed, and included the Cañada. *A priori*, then, we would conclude that it *must* have been the intention of the governor to make his grant coëxtensive with those limits, and especially to include that portion that he had so lately adjudged to be part and parcel of the estate. If he were minded to exclude anything, we should suppose that that portion—the Cañada—was the last part he would exclude, since its exclusion would go to stultify his own so recent action. This *á priori* view will be strengthened if we look again at the *concession*. The concession after, in view of the petition and of the testimony of competent witnesses, declaring to the heirs of the deceased Don Luis Argüello the ownership of the Rancho, proceeds to give certain directions or injunctions: 1st. That a "*corresponding despatch*" shall issue and be delivered—"livrese el despacho corespondiente; y tomese razon de él en el libro que coresponde, y entreguese á los interesado para los usos convenientes." Now, this present document, ought to have been the corresponding despatch here directed to issue; so that we may be certain, that at the date of the concession, viz: On the 26th November the governor intended that the despatch to be issued to the parties should be conformable to—should correspond with—the concession.

In view (says the governor,) of the petition, which begins this record, of the testimony of apt witnesses, and in conformity with the laws, the young Argüellos are the owners of the Rancho de las Pulgas; let a corresponding despatch issue to them, i. e., issue to them a document to that effect. Such is the fact, they are the owners of the

Pulgas, put the convenient, ready proof of it in their hands.

In view of the petition which describes; in view of the testimony which establishes the property that belongs to them; in conformity with the laws, which prescribe that none, especially orphans and minors, shall be despoiled of their inheritance, I declare the young Argüellos owners in fee of the Rancho de las Pulgas. What Rancho de las Pulgas? Surely that Rancho de las Pulgas described in the petition, and established by testimony; that Rancho de las Pulgas bounded by the bay, the sierra and the two creeks. And the despatch to issue was to correspond to this. Hence, we may certainly infer the governor's intention at that time; as we may also infer it from the fact, that *this concession* being made with a reservation of the approval of the Deputation, the *espediente* was directed to be forwarded to that body; and we cannot suppose, without positive testimony to that effect, that the governor intended double dealing with the Deputation, as would be implied, if we suppose he held to them the purpose to issue a despatch corresponding to the concession, and yet secretly intended differently.

At all events, the only authority that has been shown, from the Governor for the issuance of a despatch to the parties, was a dispatch *corresponding to the concession;* and if any other was issued, it was either in fraud of that injunction, or in error. But let us look at the document itself.

Whereas, (it begins,) Estrada has petitioned in the name of the young Argüellos, and a report of fit witnesses having been effected, who declare that the tract named Las Pulgas has belonged to the deceased Luis Argüello since the year 1800. The Governor, then, in this preamble, certainly adopts the petition, the testimony, and the long possession, as *the bases* of the dispatch; and according to all just rules of construction, intends that the dispatch shall correspond thereto; to embrace, in short, the RANCHO DE LAS PULGAS, with all that that name, according to the authorities which he has quoted, carries with it. If we continue the reading of the paper, we shall still find reason to think that such was its intent. "A report of fit witnesses having been effected, and these having declared that the tract named Las Pulgas belongs to said deceased since 1800, the *boundaries of which are*," the Governor certainly intends here to quote the witnesses, as well for the boundaries as for the possession.

Fit witnesses, proper witnesses, competent witnesses, he calls them; and *these having declared:* in virtue of their declaration, *therefore*, I grant. In consequence of the petition of Estrada, and in virtue of the testimony which sustains his petition, I grant. Now, the witnesses had not declared any such thing as that the *Cañada* was a *boundary* of the Pulgas. They all declare that the range of lofty hills which skirt the west side of the Canada, is the boundary of the Pulgas, as they have known it in the possession of the Argüellos for three generations.

The fact is, the concession was made in presence and view of the petition and of the declarations of the witnesses, and as a continuation of the same proceedings; while this dispatch was made on a subsequent day, on a distinct paper, and after the proceedings on which it was intended to be founded, had been transferred from the Gubernatorial Bureau to the Deputation. How easy for such an error to creep in, either from inadvertence, lapse of memory, or a slip of the pen.

Is it possible that the Governor should found, as he certainly does, his concession on the petition, and declaration of the witnesses, and quote them also as the basis of this dispatch, and yet intend point blank to ignore, to negative, to contradict their testimony, in so important a matter as one of the

boundaries; in the same act ignoring, negativing, contradicting, stultifying his own so recent judgment in the matter of the Alviso petition? Is it possible that he designs in one breath to base his dispatch on an ascertained preëxisting right of forty years, and in the next to cut down half the geographical limits of that preëxisting right? I say there is nothing in this misrecital—this inaccuracy—to warrant such a supposition; and a misrecital it only is. It undertakes to recite the petition and testimony, and it misrecites them.

But suppose it be not a misrecital. Then it is the Governor's, or Secretary's description of the boundaries of the Pulgas, in opposition to the Governor's own recent solemn judgment and decree; in opposition to the testimony of the Ayuntamiento of San Francisco and the Commissioner of the Mission of Dolores; of the declaration of the parties in interest; and of the present petition, and the declarations of three fit witnesses; of a forty years enjoyment and possession; and of the decree of concession, only of the day previous. If, then, this despatch *intends* to reduce the limits of the Pulgas; *intends* to impose a new description; then it is in fraud: in fraud of the rights of the parties; in fraud of an ancient inheritance; in fraud of infant heirs, specially under the protection of the law and its officers; in fraud of the legislature, to which the record and concession had been sent as if for the whole tract embraced in the forty years prior possession. There is no escaping this; it is either a mistake, an inadvertence, a misrecital; or it is a fraud. The Governor acknowledges and adjudicates the right of the parties to the cañada in his late decree in the case of Alviso; in now basing this despatch on the ascertained long possession, he recognises the binding force of that possession; and if he has issued a document *intended* to take away a portion of the inheritance thus acquired and recognised, it can only be in fraud, and utterly nugatory.

But there is another expression in this document which may perhaps be suggested as limiting the boundaries of the tract. After declaring that this grant is to be understood in conformity with the laws, and reserving the approval of the Deputation, it says, in a separate sentence: "The land mentioned is of four leagues of latitude and one of longitude." This sentence is easily explained, and is another convincing proof, that the despatch intended to (and only by mistake did not) follow the declarations of the witnesses. If we refer again to these declarations, we shall find that they all agree in estimating the extent of the estate in this precise way: four leagues long—one wide. And this, again, is easily understood, if we call to mind the considerations which entered into such estimates in those times; it was not the actual width of the tract, from limit to limit, these witnesses were estimating, but the width of such portions as were deemed suitable and commodious for the purpose of a cattle range. Hence, all the broad extent of *lomeria*, or broken hill land, which occupies so large a part of the width of the Pulgas, would, in the estimate of these witnesses, be left out; since it would be considered injurious rather than advantageous to the tract, the cattle straying and hiding in its thickets and ravines. This circumstance I had occasion to point out, in commenting on the discrepancy between old Señor Don Luis Peralta's estimate of the width of his tract, and the width that would be probably found on survey; at the same time contending that in regard to *the length* of the tract, his estimate (as turns out) would be found within the mark. He did not reckon those broken portions of the tract, which were bothersome instead of advantageous, from the difficulty of collecting and keeping his cattle out of them. This was so well understood in the country, that it did not need to be

explained. The same will be noted in the report of Padre Viader, in regard to the lands of Santa Clara Mission.

Whatever the number of leagues contained in the Rancho de las Pulgas, it could not have been the intention of the Governor to reduce it from its established limits, and long possession and enjoyment; since it is on these alone he bases the right which he is declaring and confirming; and hence these words of latitude and longitude can only be taken as a further recital from the recollection which the secretary who drew up the despatch, had of the contents of the witnesses' declarations. Apart from this, they are mere surplusage, and cannot, by any mode of construction, be interpreted to limit the grant. They do not go on, in the customary form, to declare that the land within the limits shall be measured, and the overplus of four leagues be reserved to the uses of the nation. On the contrary, no act of delivery, or measurement, is contemplated in this despatch: the Governor undoubtedly (and very justly) thinking that an act of juridical possession would be an absurd ceremony in a tract of exact natural boundaries, with forty years absolute and actual possession. This omission to insert the usual conditions in regard to delivery, measurement, and occupation, confirms the conclusion we have already drawn from the context of the dispatch, and of the previous proceedings that the Governor based his action on ascertained pre-existing enjoyment and possession, and intended to recognise the rights thus existing, and of course to recognise them over the whole extent that they had been acquired. It does not say in the usual form "the land donated, &c." but "the land *mentioned*," and is of course merely descriptive.

I do not know, however, that the words of this despatch, even taking them literally as they read, necessarily exclude us from the western boundary by which we claim. A cañada, or valley, in general speech, is understood, not alone as the bottom or plain of the basin, but of its rims, of the hills or mountains which skirt and form it; a signification which the Copingers, "contestants" in this case, understand and adopt. Now as it is plain, that by the decree entered in the matter of Alviso, the Governor considered and adjudged us to be the owners of the cañada; and as all the subsequent testimony that came before him only went to show the correctness and justice of that decision; and as his concession made on the 26th November, adopts the petition and testimony; and as his directions for issuing the dispatch are, that it shall correspond with the concession; i. e., with the petition and testimony; and as this dispatch does, in fact, also begin by reference to and adoption of the same document and evidence; it seems to me, that we must conclude, that if the description *Cañada Raimundo* was used purposely—was used by intent, without qualifying words—it was because it was intended as an equivalent, intended to embrace the whole valley, with its margins, to the top. This is far from being a forced construction. In fact, it is the only construction that will preserve any sort of consistency in the act of Governor Castro, once admitting that the difference in the language of this and the other documents is more than a misrecital, the only way to make the dispatch correspond with the directions given for forming it, with the facts of the case, with the documents to which it relates, with the justice of the Government, or the rights of the parties.

Certainly, without these strong circumstances to show the *intent* of the Governor, and the sense in which the words were used, we should, if we admitted they were used designedly, give them a different construction. The ordinary rule of construction would make them signify only *to the middle*

of the Canada, on the same principle that when a river or a road is called for as a boundary, the middle of it is intended, or of a range of hills or mountains, the crest, which is supposed to be the middle. In the cession of the northwest territory by the State of Virginia to the Confederation, the words of cession were, the country *northwest of the river Ohio;* and it has always been held that this meant "beyond" the river; hence, that no portion of the river was conveyed, but the jurisdiction of Virginia remained intact over the stream. Had the river been mentioned, however, in general terms as a boundary, the dividing line would have been in the middle of it; and in the present case, if there were no controlling circumstances—nothing else to show the meaning of the Governor—these words in the dispatch before us, would only intend *to the middle of the Cañada.* But, as I stated, the Copingers, contestants, have perceived that, without violence to language, we might suppose the word Cañada, or Valley, to signify not alone the deepest recess of the vale, but the whole basin, with its rivers, the hills and mountains which skirt and form it, even to their summits. Hence, under the supposition that the Pulgas is bounded by the Canada Raimundo, they interpret and ask (on their motion of intervention) that this Board will interpret that to mean the middle of the *eastern rim of the Cañada,* i. e., the summit of the *lomeria baja.* Certainly, there is no ground for this interpretation or request. Because—

1st. The whole proceeding on which we are now remarking was a remedial measure; i. e., to remedy the loss or lack of documentary muniments of title in the young Argüellos to their inheritance, and all remedial measures are to be construed to their largest extent, not narrowed.

2d. It would be presenting this document in a light still more inconsistent with the previous acts of the Governor, and with the facts on which it assumes to be based.

3d. Because it is shown in the testimony adduced by them, (said contestants,) not to be the true construction; since, in the juridical possession so called, which they and the Government attempt to prove, under this document, the line was run far into the Canada, instead of stopping on the crest of the eastern hills. (See the testimony of Martinez, Flores, and Hernandez.)

I conclude, therefore, that if either *side* of the valley is to be taken, as intended in this despatch, it is the western, not the eastern: and that, otherwise, that is, if the controlling circumstances and considerations I have enumerated, do not compel us to assign as the intent of these words, the *whole Cañada* to the midst of the sierra which forms its western side, then we must assign them their usual signification, and suppose the middle of the Cañada to be intended.

But I must say, I do not perceive why so much importance should, under any view that it is capable of assuming, be attached to this despatch. It is later in date, and consequently must yield precedence to the concession. It is in no respect a more formal instrument. It does not answer the description which the Government and the Copinger 'contestants' try in the cross-examination of Pacheco, to establish for what they are pleased to call a "title in form." It begins with a "*por cuanto,*" certainly; but it doesn't end with "conditions Nos. 1, 2, 3, 4." The "*forasmuch,*" (which is the literal translation of "*por cuanto,*") doesn't help them; since its connection is with the petition and testimony, which give us the whole cañada to the top of the mountains; and its omission of the "conditions No. 1, 2, 3, 4," show that this was not considered as conferring a new title, in which an act of measurement and possession would ascertain its limits. Like the

concession, too, this instrument is subject to "the approbation of the Deputation." Now, do they or the government pretend to show that this has ever received the approbation of the assembly? Certainly, if it ever did, it must have been subsequent, not only to the concession, and its approval, but at a long subsequent sitting of that body: for they have established by Pacheco, that, when, as committee on vacant lands, he had the subject of this concession before him, he did not have any such paper as the dispatch, nor ever saw it, till it was here, at the taking of his deposition, shown him. At best, then, it would be a document of subsequent confirmation, and could not operate to destroy or limit rights vested by the prior one.

But suppose that this document had been before the deputation—suppose it were before them, and within their province, at the time of passing the resolution of confirmation which I have read, as seemed to be the idea of the law agent and the contestants in the cross-examination of Pacheco. In that case, the Deputation discarded this, and adopted that; and it would almost appear that something of that kind were intended, from the particularity with which the concession of the 26th November is designated by its date; and in that case, it was the concession, and not this despatch, which became final: decisive.

That the emission of these new titles to the Argüellos was not supposed at the time, or for a long while subsequent, to have omitted the Cañada, may well be inferred from the silence of Alviso and others, under the circumstances. After the Argüellos, Alviso had the first claim on the Cañada. These proceedings were only about six weeks subsequent to the time of the repulse of his petition on the ground that the Cañada belonged to the Argüellos. A reversal, therefore, of that decision would have inevitably revived his pretension to the Cañada: and from the mere fact of that claim not having been further urged, we may well conclude that that decision never was understood to have been altered. The Cañada was and is a desirable tract; with abundance of living water, and grass of perennial growth, it furnished pasturage when the plains below were arid with the heats of summer; a circumstance that made it particularly valuable in a pastoral community as this strictly was. It was also desirable from its locality. That Alviso should have foregone his pretension, therefore, after having twice petitioned for the land, as is shown in the record of his case; and that, he allowing it to pass, no other of the inhabitants either of the district of San Francisco, or of the Pueblo of San José should have petitioned for it from 1835 to 1840, certainly goes to show that the right of the Argüellos to the Cañada was not supposed to have lapsed; that the interpretation now attempted to be given to these proceedings was not then suspected.

It is not impossible, however, that the ingenuity of the opposing counsel may attempt to find, in the last clause of the resolution of the deputation approving the concession, some countenance for the supposed restriction of limits in the dispatch.

This resolution says:—"Se aprueba la concesion, &c., sugetandose à los condiciones que se estipularen," *subject to the conditions which may be stiputated.*

But in the first place, this was a mere formulary, only intended for the purpose of securing the right to insert the customary conditions touching occupation, measurement, &c.; proper, certainly, in the creation of new rights, but which would have been idle in this case, and the fact of the omission by the Governor to insert any conditions, shows that he so regarded it.

Secondly: This clause is in the fu-

ture or subjunctive, and cannot be made to relate back.

Thirdly: This misrecital of boundary is in no respect a *condition*.

The approval of the deputation is to the grant of the *Rancho de las Pulgas*, and it is that grant which is to be subject to such conditions as may be stipulated. Now, a *grant of the Pulgas* cannot be conditioned that only half of the Pulgas be granted. The deputation confirm a thing done; i. e., a grant of the Pulgas. Now, if a clause in this confirmation, that the grant should be subject to such conditions as might be stipulated, could be interpreted to license the abrogation of half the grant, then it could be interpreted to license the abrogation of the whole of it. And we all know that a condition which is contradictory, to the object of the grant, is void. But this error in description is in no sense a *condition;* it cannot be a condition of a grant of the Pulgas, that only half of the Pulgas or none of it shall pass. [It is not pretended that any conditions *were* attached to our grant, either before or subsequent to this confirmation of it by the deputation; and if it be pretended that *the law* attached conditions to it, the proof shows an ample fulfilment of any that could have been lawfully inserted.]

I have said that the clause commented on in this despatch is a misrecital, which could be corrected or stricken out as surplusage. It will be borne in mind, that this is not a mere description of a piece of land which the Governor is about to grant, and of which consequently the limits would be arbitrary, but it professes to be a description of a thing well known, and already designated both by name and by reference to other instruments, which fully and accurately describe it. Either, therefore, on the principle that where the instrument in question refers to another instrument, we go to that other to correct any error or ambiguity, or on the principle that where the object is once fully designated, any variant description will be disregarded as unnecessary, this error (if the instrument in which it occurs be in any way necessary to our title, which I, however, do not think,) in the description ought to be corrected: because, the dispatch refers to the petition, testimony and ancient possession, and describes the place as the *tract named Las Pulgas*, the boundaries of which are, &c. Now, if I make a deed of my lands in the Pulgas, conveyed to me by deed of such date, the boundaries of which are, &c., and then I give an erroneous description, whether by design or mistake, the law will go behind that description, to the deed to which reference is made, and hold the property intended sufficiently described therein, and the remainder, false showing, unnecessary, and surplusage.

The noted case of Goodtitle *v.* Southron (1 M. and S. 299) is exactly in point. It was the case of a will, where the devise was of all my farm called *Trogue's Farm*, now in the *occupation of A. C.*, and it appeared in fact that part of the lands which constituted Trogue's Farm was in occupation, not of C., but of M. Held, that the thing devised was sufficiently ascertained by the devise of Trogue's Farm, and that the *inaccurate part of the demise* (i. e., of the description) *might be rejected as surplusage.*

The case is thus quoted in 2 Phil. Ev., 308; and in like terms in 1 Gr. Ev. §301. But the case as reported, is even stronger: because there was testimony to show that the closes in controversy had not originally (not even in the devise by which this devisor acquired them) been known as a part of, but adjoining, Trogue's Farm. But the court allowed a *notice to quit*, which had been served by this devisor on M., some months before the making of the will, to be produced as showing that the devisor considered the closes which M. occupied, to be

parcel of Trogue's Farm. Now, there was no reference in the devise to that notice to quit, nor to any other instrument. Yet the court allowed a reference to it to show the devisor's nomenclature of the place, and disregarded that part of the description which (Trogue's Farm being sufficiently ascertained) was variant and useless.

How much stronger the case before us:—

1st. The tract as now claimed had from time immemorial been all held as constituting the Rancho de las Pulgas, a noted place, with noted boundaries: bounded by the two principal streams within a distance of fifty miles; the lands on either side of it pertinent to public establishments; and this place famous at once for its position, beauty, richness, and as the oldest and finest then existing estate, and the inheritance of the principal family of the province.

2d. The Governor, the grantor, the maker of this dispatch, only six weeks before, himself held and considered the Canada to be a part of the Pulgas, by a decree to that effect.

3d. The concession of 26th November shows positively his intention to include the whole tract.

4th. The reference in the dispatch to the petition and testimony, and the ancient possession, makes all those a part of the recital, and leads us necessarily back to them for the description.

I say, therefore, that if the devise in the case quoted had been simply of the place called Trogue's Farm, without other description, there might still have been a question, because the closes in controversy had not originally, nor even in the devise by which this devisor had received them, been so called. But if the recital in this dispatch had been merely of the *Pulgas Rancho*, even without the reference to the petition, testimony, and ancient enjoyment, there could have been no question as to what was conveyed; for the locality in question had never been otherwise known than as a part of the Pulgas; as such, it had passed as private property through three generations; and as such, the same Governor had recently solemnly adjudicated it.

In Day *vs.* Trigg, the devise was of all the testator's *freehold* houses in a certain street, and it turned out that he had *no freehold*, but had *leasehold* houses there; and that as there was no property to satisfy the description, the word *freehold* should rather be rejected. 1 P. Wms. 276. 2 Ph. E. 308.

In Moseley *vs.* Vassey. 8 E. 149. After parol had established that the local description of two estates had been transposed by mistake, the county of *Radnor* having been applied to the estate in *Monmouth*, and *vice versa*, held, that it was sufficiently to be collected *from the words of the will itself*, which estate the testator meant to give to the one devisee, and which to the other, *independent of their local description;* all, therefore, that was done, was to *reject the local description*, as unnecessary, and not import any new description in the will. (Quoted in 2 Phil. Ev. 307.)

So here, the intention of the Governor is plainly indicated, by the words of the grant itself, what estate he intends, independent of the description, which is erroneous in point of fact; and all that is necessary to make this dispatch correspond with the evident intention of the Governor, and with the facts of the case, is to reject *the local description* as unnecessary.

All these cases, and many others that I might cite, are decided on this principle: that where there is a sufficient description or designation to ascertain the thing devised or granted, a part of that description or designation, which is variant or inaccurate, will be disregarded. The rule is derived from the maxim, that a false description or demonstration will not vitiate, if a sufficient designation remain—*Falsa demonstratio non nocet, cum de corpore constat;* i. e., that if there be a sufficient description of the

object or subject intended, independent of the *falsa demonstratio*, so much of the description as is false is rejected, and the instrument will take effect, if a sufficient description remains to ascertain its application. "The rule," said Mr. Justice Parke, (Smith *vs.* Galloway, 5 B. and Ald. 43. 51, cited in 1 Gr. Ev. 392,) "is clearly settled, that when there is a sufficient description set forth of premises, *by giving the particular name of a close, or otherwise*, we reject a false demonstration." 2 Ph. Ev. 552. 1 Gr. Ev.: Sec. 301.

Now, in this case, there is a sufficient and unmistakable designation, both by name, and by reference to other instruments and to facts; by the name Rancho de las Pulgas; by reference or relation to the petition, the testimony, and the ancient possession. So that, while all the cases I have cited, are ruled alone on the principle of *falsa demonstratio*, ours here is sustained not only on that rule, in its strongest application, but also on that other even more forcible rule which I have mentioned, that where an instrument refers in terms to another instrument, or other extrinsic fact or matter, that also will be made a part of it.

But whatever the purport, or whatever may be the interpretation of this dispatch, the parties had a *right* to a dispatch corresponding with the concession; this, not only according to the concession itself, but by law.

The concession itself directs that *a corresponding dispatch* shall issue; and accompanying the resolution of the deputation, approving the concession, is the *direction* that the concession being approved, the espediente shall be returned to the Governor for the *consequent ends*.

Now, what are the *consequent ends*, is plainly enough laid down in Sec. 8. Reg. 1828. The concession asked for being definitively made, a document shall be issued, &c., expressing therein that *the concession*, &c.

Wherefore, I say, both by the terms of the concession, itself, by the terms of the law, and by the force of rights, vested by the concession, and become definitive and absolute by the approval, (not to speak now of the pre-existing rights,) the parties had *a right* to a dispatch, or document *corresponding with the concession*.

That the Governor should issue a dispatch corresponding with his grant was so clearly his duty, that I venture to say, under our system of jurisprudence a mandamus would lie to compel him to issue it. If this Board and appellate tribunals confirm a claim for two leagues, and the Surveyor General should refuse to survey, or the Commissioner of Lands to issue a patent for, more than one, the case would not be very different from the present, supposing this dispatch really to intend reducing the limits of the concession; and certainly a *mandamus* would issue to compel such a patent as the party could claim under the law. And if a patent should issue for the one league, and it so appeared on the records of the land office, yet that would not impair the right of the party to his patent for the remainder. Neither the patent, directed by the law of 3d March, 1851, to issue for confirmed claims here, nor the document contemplated in the 8th Sec. Reg. 1828, to grantees with definitive concessions, is designed to add anything to the validity or binding force of the title. When a concession is definitively made, (as say Reg. 1828,) or a claim finally confirmed, as says our law, there can be no further sanction to it; and the patent or document directed *thereupon* to issue to the party, is only for his convenience and use, to manifest on all occasions the right before acquired. And the duty which will devolve on the Commissioner of the Land Office, and the President, to issue patents to claimants here, whose claims shall be finally confirmed, are just such a ministerial function, as the duty prescribed to the political chief in 8th Sec. Reg. 1828. Yet no one will pretend that they can issue a patent otherwise than according to the confirmation, nor doubt that the

party may peremptorily assert and demand his right to receive such patent.

While, therefore, I believe I have successfully sustained the position, that this dispatch does not intend to restrict the operation of the grant, and that if it did, the thing granted is sufficiently ascertained by the designation of the place by name, and with reference to the preceding process which describes it, so that the erroneous description will be disregarded as surplusage, I also contend, that without this dispatch, or any other, and not only without it, but in spite of it, we have a perfect title, to which the issuance of the document contemplated in Section 8, in all form, could give no additional validity; only furnish a more convenient mode of proof. Moreover, that the issue of this dispatch for a portion of the land, could not impair our right to the remainder of it, nor our right to receive a further dispatch for the remainder.

But, however all this may be, the Rancho de las Pulgas, Cañada and all, was ours before either this concession or this dispatch, and as we have never parted with it, it is still ours.

Whether the proofs exhibited do or not establish as an actual fact, the possession of a *written title*, either in Don J. D. Argüello, in the last century, or in his son Luis in this, they present such a state of facts as to establish a rightful possession, both by the one and the other, and consequently to suppose a title as its foundation; moreover, to have conferred a title even as early as 1835, by lapse of time.

The fact, which appears in the testimony taken before the Ayuntamiento of San Francisco, that Don Luis had, for a period of five or six years, loaned the Rancho to the Government, would make it appear extremely probable that on its restoration the Governor would issue to the owner an instrument certifying the ownership. This probability is strengthened by the declaration of Sanchez, that he *knows* Argüello made an application to Sola to that end; and it is rendered nearly certain by the report of Padre Viader, so declaring it, and by the entry in the Land Book endorsing the report. There is also a tradition in the family that such was the fact, and it is believed by them.

My case does not need, however, that Sola should have issued a title to Argüello. This state of facts is certain, namely: that about 1815, Luis Argüello was in possession of the tract, as its owner; and loaned the tract, or permitted its use, to the Government, *and that about* 1820 *or* 1821, *the Government in all form restored it to him.* I care not, therefore, whether with this act of restoration a written title went. If none was given, it affords the best kind of evidence that none was thought necessary.

Suppose we came here on these naked facts;—that in and prior to the year 1815, this Rancho was possessed by Dn. Luis Argüello; that he in that year turned it over, by way of loan, to the Government; and that, after occupying it for a series of years, the Government formally retired from it, returned it to Argüello, and he and his family ever after continued to enjoy it. I do not know any way in which a more decisive acknowledgment of our right could be given by the Government, or any stronger proof that could be advanced of confessed title. There is not a court in Christendom that would not sustain a right thus shown and confessed. The very fact of the Government thus receiving, and thus restoring, thus formally delivering over, both shows and makes a title in Luis Argüello. Perhaps it would be better thus without a title than with one: for such is the learning and accumen with which the Government is represented here, that means are found to question the right of Sola to make a grant of any thing bigger than a house lot and garden patch. But if it appear that Sola made this restoration on a *preëxisting right*, we are bound to

suppose, not knowing, or having any means of knowing, the nature of that right, we are bound to suppose it was paramount; that Sola knew what was a lawful title, and that he did not yield the possession without just cause; that is, if a title appeared from Sola—it may be admitted, for a moment, for the sake of argument—that laws and ordinances enough might be found to show that Sola exceeded his authority in making the instrument: because we should have the instrument itself to test his authority by. But no laws or ordinances can be found, to show that he was not a competent judge of what did constitute a good title; and we are bound to suppose that he acted in the premises with competent knowledge and power, unless we knew *on what* he acted, and thence could impeach it.

A long possession, coupled with other circumstances, without the production of a grant, will often *presume* a sufficient title: but if a grant appear, then it is open to whatever objection, whether of power in the grantor, capacity in the grantee, or its sufficiency in the premises.

So, the government and the contestants, in this case, are welcome to either horn of the dilemma. They may have it either that Sola in restoring the Pulgas to Argüello in 1820–21, issued to him a title; or that he contented himself with the formal act of restoration. That the act was formal and positive is shown, not alone by the testimony, but by the entire withdrawal of the public cattle, and the absolute dominion which Argüello ever after exercised over the Rancho; only permitting by sufference, and that temporarily, the pasturage of the Mission sheep of Santa Clara; driving off intruders, (as shown in Osio's testimony,) and all other acts that indicate ownership.

But we show, moreover, an immemorial possession—a possession reaching into the last century, certainly, and of which the beginning does not appear; consequently immemorial—a possession which necessarily supposes a rightful beginning, since, as says Vattel, whence can reasons be brought against it, its origin being lost in obscurity? I will read the whole passage—it is from a book of the highest principles and soundest morality, and whose precepts are made, by statute, positive law for this Board and appellate tribunals:

"What we have remarked in the preceding section relates to ordinary prescription. There is another, called *immemorial*, because it is founded on immemorial possession, i. e., on a possession the origin of which is unknown, *or so obscure that it cannot be proved whether the possesor had a real proprietary right, or whether he received the possession from another.* This prescription immemorial secures the possessor's right, and it cannot be taken from him, for it is presumed he had the right of a proprietor while no solid reasons have been brought against him; and indeed, from whence could these reasons be derived, when the origin of his possession is lost in the obscurity of time? It ought even to secure him from every *pretension* contrary to his right. What would be the case were it permitted to call in question a right *acknowledged time immemorial, when the means of proving it were destroyed by time?*—Immemorial possession is then a title not to be expunged, and immemorial prescription suffers *no exception*; both are founded on a presumption which the law of nature prescribes us to take for incontestible truth." Vattel lib. ii, ch. xi, sec. 43.

And this, our possession, again has been constantly accompanied with specific acts and declarations of the Government, recognizing and acquiescing in it.

It has run through three generations, passing by tradition from Don D. Argüello to his son Luis, and from Don Luis, by descent, to his children. I say then, unhesitatingly, that this long possession, with all these aiding circumstances, not only presumes but makes a title—a title to the Rancho de las Pulgas, with all that the name implies, coextensive with the enjoyment, coëxtensive with the occupation, reckoning the occupation according to the uses for which land was held and granted in those days; coëxtensive with all the limits commonly known by the given designation.

As to what is and always has been

the Rancho de las Pulgas, what particular locality, with what limits and boundaries—no fact was ever better or more fully proved before a judicial tribunal, than is that fact before this Board.

The venerable Crisostomo Galindo knew it upwards of fifty years ago, and knew its boundaries, as the San Francisquito, the San Mateo, the Bay, and the Sierra beyond the Cañada Raimundo—knew it so occupied by J. D. Argüello. He not only knew it as such from his contemporaries, but the old people, *los antiguos*, so called it.

To be sure, the Law Agent (Mr. Cooley was law agent at the time) could not get this simple-minded old gentleman, by all the ingenuity of cross-examination, to say that he knew the name of the place to be Las Pulgas by any other means than having always heard it called so, or the boundaries to which the name was applied, by any other means than immemorial reputation. I do not, however, know any other mode of learning the name of anything. It is the only way I know the name of the Bay of San Francisco; it was the only way I knew the name of the law agent to be Judge Cooley, and the only way I knew Judge Cooley to be the law agent.

I am aware there are questions connected with proving *boundaries* by reputation or hearsay, but there never was a question as to its competency to prove *identity*, and could not very well be, since that is the only mode of such proof. Names are only conventional; and to prove what everybody calls a certain locality, is to prove its name—and this is not secondary or hearsay evidence, but direct. A grant of a tract of land by name, is as good as any other description. A demise of *Whiteacre*, without defining its extent and limits, opens the way to show what Whiteacre is. This is the example given by Blackstone.—The fact may be proved like any other fact—it may be proved by reference to authentic instruments which describe it, or refer to it; by what is so called in the country; by what was understood to be comprehended in the term by the grantor. We have seen to what extent the Court went in the case already cited, (Goodtitle v. Southron,) where the demise was of *Trogue's Farm*, and though it was shown that the present devisor had not received the closes in question as a part of Trogue's Farm, and though to include them it was necessary to disregard another part of the description, yet a paper in which he had once so denominated them, was permitted in evidence to prove the point. "Parcel or no parcel," says the learned Judge in that case, "is the question, and it may be proved like any fact." It is therefore entirely competent for us to prove, by parol, by reference to documents, by reference to grants of surrounding lands, by any mode that establishes identity—that establishes "parcel or no parcel," What were the limits of the tract of Las Pulgas—whether the Cañada is parcel of it?

But I may also (leaving out that phase of the question) prove *boundaries* by reputation. The Supreme Court says, in Boardman's case, 6 P. 341, that there is "no doubt" of the rule, that boundaries may be proved by parol—by reputation.

And surely no stronger case ever existed than this for the application of the rule: the boundaries all so notable, unmistakeable; at either end the two largest streams in the whole extent of the road, from the old Presidio settlement of San Francisco to the agricultural village of San José; at one side the broad expanse of the bay, at the other a lofty range of mountains crowned with the colossal columns of the Madera Colorada. Itself noted through its extent, for the richness of its verdure, the beauty of its park-like forests; as up to a late period the sole private estate, (with the exception of

the village lots of San José) between San Francisco and the Rancho de las Animas, near San Juan Bautista; and moreover as the possession and inheritance of the most considerable family in the country; of father and son, successive Captains of the Presidio of San Francisco, in a community composed almost entirely of active or retired soldiers of the Presidio; how could the place, with all that concerned it, fail to be famous? fail to be known as the witnesses say, to every body? Moreover, what opportunities all the witnesses, who have appeared, had for knowing the actual limits of the possession of the Argüellos, as well as the boundaries assigned by public reputation, and by actual use, for the tract called Las Pulgas. José Sanchez had been serjeant at this Presidio from an early date, and by virtue of his office associated with the Captain, and with opportunities to be well informed. His son José de la Cruz, born on the soil, and learning these facts with the first dawn of his understanding. Juan Miranda an old soldier of the Presidio. Of the witnesses whose parol has been heard before the Board, Galindo, Peña, Chaboya; old soldiers, in the early times, making their excursions to the pueblo, whenever they could escape military duty long enough, and always making the Rancho of their Captain a stopping place—often assisting to brand his cattle; and again employed during the time of its occupation by the government for a period of several years in herding there the king's cattle: the cattle and horses destined for their own sustenance and use. There were also other reasons why they should know the boundaries of the tract: why they could not fail to know them. The lands on either side were of public institutions, and to know their limits was to know those of Las Pulgas. So says Martinez; not our witness, and certainly no way disposed to testify in our behalf, and it is shown by all the testimony—parol and documentary.

All the circumstances then, that can combine, to make this *undoubted rule* as the Supreme Court term it, applicable, concentre in this case. It was said by the cidevant law agent that this kind of proof was not admissible in questions of *private right*, though it might be in questions of public interest. The reason, however, why this distinction was ever drawn, was on the ground of *want of competent knowledge* on the part of the declarant, (1 Gr. Ev. sec. 137,) and the rule ceases when the reason of it ceases, and it has always been much more liberally construed in the U. S. than in England. The reason of the rule does not apply here: for no want of *competent knowledge* can be alleged in the declarants: and, moreover, a single circumstance takes it out of the rule in the strictest application; i. e. the fact that the boundaries to be proved were *identical with others of a* public or *quasi* public nature. 1 Gr. Ev. § 145.

Moreover, reputation is evidence against a public right, as well as for it. (1 Gr. Ev. § 140, and authorities cited). Reputation to these and like ancient facts was also admissible by the civil law. (See end of note 1, Gr. 239. 1 Domat 823, ib. 808.)

Moreover, proof of this kind must of necessity be received in all cases where it is a question of prescription or of presumption of a grant. These are founded on possession; and of course the extent as well as the duration of the possession must be proved,—and how can this be done except by parol, or by inferential testimony? So it is a rule in construing ancient grants, that they shall be interpreted according to the extent that they have been enjoyed; and the same must be the case with reference to an ancient possession, on which a presumed grant rests. Now how is the manner and extent of an ancient enjoyment to be proved except by acts of

ownership, except by public repute, except by the extent to which other people did not interfere; that adjoining neighbors acknowledged; that *dominion*, in short, in whatever way, was exercised; and this to be proved by what people saw, heard, and did? In Schauber *v.* Jackson, 3 Wendel. 1, the question was of presuming in order to sustain an ancient possession, a conveyance to have been made. Among the testimony admitted, was *parol* to prove an ancient *reputation of ownership* in certain parties; and to rebut that, and to raise a *counter presumption* that that reputation was erroneous, arising from the fact that these parties had owned land in that vicinity, a deed from them of lands adjoining was admitted. The evidence on either side was objected to in the court below, but the objection overruled. In the Court of Appeals, the competency of the testimony does not seem to have been questioned either in the discussion of counsel or opinions of the judges, (Chancellor and Senators;) and the case was decided on this proposition: "Ought the facts and circumstances [those above mentioned inter alias] of the case to have been submitted to the jury, so as to have authorized them to presume a conveyance?"—which was affirmed by the court: ayes 16, noes 7.

There is, likewise, a passage in the opinion of the Chancellor, delivered in this case, worthy of note, as showing what presumptions will arise from the acts or omissions of the State or its officers. The parties—Dubois and Delancy—to whom was attributed the ancient ownership, were alien enemies at the breaking out of the revolution; and on their returning to the mother country, their lands were subject to sequestration. Therefore says the Chancellor—"If any legal presumption could arise from the public report that Dubois and Delancy were the owners, and from the descriptions of boundaries of adjoining lands, *that presumption is rebutted by the* CIRCUMSTANCE, *that* THE STATE *never made any claim to the land, though it lay within a few miles from Albany, where the Commissioners of Sequestration were.*"

To proceed: I shall presume, that reputation of ownership proved by parol, is an element in presumption of title; and that in the circumstances of this case, boundaries may be proved by public reputation. Hence, that the testimony of Galindo, Chaboya, the venerable Peña, Hernandez, Suñol, Vallejo, and others, as to the boundaries of the tract known as Las Pulgas, is admissible, and establishes the fact as to what those boundaries were; and that the long occupation, with reputation of ownership, is *prima facie*, and, supported by claim of ownership, and the various government recognitions of that claim, conclusive evidence of its validity. All the testimony agrees as to what those boundaries were; not alone our own testimony; but that of the Government. What says Martinez?

In answer to the third interrogatory, on his first examination: "I reside between the Creek of San Francisquito, and the Matadero. *Las Pulgas is to the north of me.*"

And again, in answer to question No. 6, as to where the king's cattle ranged, whilst he tended them, (that is, during the time that Luis Argüello had loaned his rancho to the government for that purpose):

Ans. "They ranged from San Mateo creek to San Francisquito, about Monte Redondo, Cañada Raimundo; *all of which places were considered as being embraced in the Rancho de las Pulgas.*"

And again, after testifying (answer to cross interrogatory 7, first deposition,) that the Alembique creek, one of the highest branches of the San Francisquito, is his northern boundary, he says:

Cross Int. 8. "Have you known the creek which is your northern boundary, to be also the boundary of the Pulgas?"

Ans. "I have; because they told me that the Pulgas reached to it, and therefore they did not give me further than that creek. The magistrate who gave me possession, and had the official reports on the subject before them, told me so. The manager of the Pulgas also having appeared there and claimed it."

And agāin says Pico, another government and Copinger witness:

"The Alembique, and several other smaller creeks, empty into the San Francisquito, and it is said they form the boundaries between the Pulgas and the Rancho of Martinez."—*Ans. to inter.* 8.

And Martinez, again, when brought to *re-swear*, and contradict his former testimony, repeats in substance the same thing, and shows that the San Francisquito, in its very highest branches, was always a boundary of the Pulgas.

This is all government testimony, and cannot be gainsaid by the government.

As for the testimony of José Sanchez, J. de la Cruz, and Miranda, taken before the municipal authorities, by direction of the Governor, in 1835, and that on which the reports of the Municipal Council and Commissioner of San Francisco are based, in the matter of Alviso's petition, I do not comment, because I hold the competency both of the witnesses and of their testimony to be already established by the fact of their being received by the tribunals before and for whom they were taken.

And what is the testimony that is attempted to be brought against us?

1. That of Maximo Martinez. When he is brought to *re-swear*, he testifies that the king's cattle pastured on the Pulgas, and he herded them there as early as 1812, and that previous to the time of his herding them there, he never saw the cattle of the Argüellos; that in a conversation with Doña Soledad about two years ago, he asked her why she did not send to Mexico for a copy of the ancient title of the Rancho, and she replied that in those days titles were not given to the military, and that no such title ever existed. How came he to ask that question of Doña Soledad, except that he, like all the rest of California, had always known the Rancho as that of Argüelos, and hence supposed that there was an ancient title? As for her answer to him, suppose it to be truly reported by him, it was only such an answer as she might well think proper to give to an enemy, the disguise of whose pretended friendship she penetrated; and which in any aspect of it proves nothing, as she could not possibly know what he says she said. It is not the sort of admission that is evidence: it is an expression of an opinion, (if it be true, and which I do not flatly deny, only because her evidence would not be admissable to contradict it, and Martinez was careful to make the alleged conversation between them alone, so that he might have the swearing all to himself;) it is at most an expression of an opinion (and that an erroneous one) on a point of Spanish law; but the testimony goes certainly to show that Martinez had previously supposed such a title to exist, and hence, as far as it is worth anything, is in our favor; since that idea was not an original growth in the witness' mind, but had its origin, no donbt, out of the same state of facts, that led him in 1832 and 1833, and again in 1844, in his petition for lands in Cañada de Corte Madera, to designate the branches of the San Francisquito as the boundaries of the Pulgas, the property of the Argüellos. As for his other assertion, that he had known the king's cattle on the Pulgas, and *had herded them there in* 1812, and so onwards; and had *not before known or seen the Argüello cattle there*, let us see what he says in his first deposition, when he came to the stand untutored:

Ques. 21. During what years did the King's cattle pasture on Las Pulgas?

Ans. They might have been there from five to six years, *from about the year* 1815.

Cross-exam. 13. How long ago did you know the Rancho de las Pulgas?

Ans. I have known it since 1810.

Ques. 14. Did you know of cattle being pastured on it before the King's cattle you mentioned?

Ans. *I saw cattle there before that time, said to be Arguello's*, but I did not know whose they were.

And again; after testifying in answer to cross interrogatory 21, that he first became a soldier in 1812:

Ques. 22. How long after you became a soldier were you first engaged as a herdsman of the King's cattle?

Ans. It appears to me I first became herdsman of the King's cattle *about the year* 1815, but I am not certain as to the time.

Ques. 23. Had you been a soldier six months before you were occupied with herding cattle?

Ans. It was more than six months—*and it was three or four years.*

His statements in the particular that the government has sought to establish, are contradicted by his own previous unpremeditated, and consequently true testimony. It is contradicted, moreover, by the testimony of Sanchez—father and son, Miranda, Chaboya, Peña, Galindo, and last, not least, by the circumstantial report, introduced by the Government and contestants, of Padre Abila, who fully corroborates, in this respect, all the testimony of our witnesses, that in 1815, it was, that the rancho was allowed for the grazing of the public cattle.

2. The testimony of Flores, introduced, if for any purpose, to show the aforesaid pretended measurement of the Pulgas. He says that measurement extended to the Monte Redondo: which Martinez in his testimony shows, is only about 1,000 varas from Copinger's house; and Fernandez, only 200 or 300 varas east of the sierra. He, Flores, moreover states that this measurement took place in 1835. Martinez testifies that his own juridical possession took place in 1836, by the same magistrate who had given that of the Pulgas only a month or so before, and that, coming to the Alembique creek they would allow him to go no further because that was a boundary of the Pulgas.

So that, if there was in fact, the ceremony of a measurement under this pretended title, the magistrate must have construed it nearly as I have suggested, to include the whole Cañada, if not the mountain side. And I take it, that in the very worst possible point of view, both the government and the contestants are precluded from denying our right, at least, as far west as the Monte Redondo and the sources of the Alembique; since they have shown that at least so far, the land was set apart to us. I will not touch this point, however, without entering here as every where a denial of any right of this magistrate to perform, or of Estrada, in whatever capacity, to consent to any act cutting off the long vested title which these minor heirs had up to the crest of the sierra.*

3. The testimony of Antonio M. Pico, who shows, that though Copinger had built a house near the Alembique creek, he had always heard that that and the other branches of the San Francisquito were boundaries between Martinez and the Pulgas.

4. A statement of the cattle belonging in the year 1804 to the Royal Treasury at the Presidio, and an account of sales of the same, from which it appears that in that year Don J. Arguello, purchased from the lot three heifers; and also some returns of the inhabitants of San José, with their marks and brands, in which the name of Argüello does not appear, (and could not appear, since both his residence and his rancho were not in the jurisdiction of San José, but in that of San Francisco.) It is not

* There is no competent testimony of this pretended judicial measurement. If it ever took place, it must have been noted in writing, and of record, and no foundation has been laid for introducing this secondary testimony. I deny the authority of the whole proceeding, if it took place; and I deny that there is any proof that it did take place. If considered at all, however, it must be to the full extent that the Government witnesses have testified to, and take the boundaries to the foot of the Sierra.

possible to give even a remote guess at the purpose for which the Government introduces these papers; and it is certain that they argue nothing in relation to the case, and consequently do not admit of argument. I only notice them to show what violent, at the same time abortive, efforts are made against us; and what trivialities are all that the most anxious labors of the land office has been able to produce.

5. A Statement or Report of Padre Abila, of the Mission of S. Luis Obispo, on being called to certify what he might know of the ownership of the Rancho of Buriburi.

The object of introducing this Report, I suppose to be, first, to estabiish what was so often attempted in the examination of witnesses before the Board, namely, that prior to the transfer of the King's cattle to the Pulgas in 1815, that tract (the Pulgas) had been a *Mission Rancho.*

On this Report I have therefore to remark:

1st. That so far as it touches the Pulgas, it departs from the inquiry directed to the Rev. Padre, and hence is incompetent testimony.

2d. That we were not parties to the taking of it, or to the investigation or matter in which it was taken, and are consequently in no way bound by it.

3d. That it is not upon oath, and the splenetic temper in which it is written, deprives it of the character of fairness or impartiality.

4th. That it is not adopted by the government as evidence even in the matter to which it was pertinent, namely, the question of the Buriburi ownership—but entirely disregarded and set at nought.

5th. That it had been before the government a year or more, at the time of the investigation in the matter of the Alviso petition; and not entering then into the consideration of the ownership of the Pulgas, cannot with any propriety be now brought into the question.

6th. It is contradicted, in both the particulars mentioned, and for which alone I snppose it is introduced here, by the testimony of Sanchez, father and son, Miranda, Galindo, Chaboya, and Peña; and by the judgment of Gov. Castro in that very despatch of 27th November, which is brought here, which is the main or only reliance of the government and contestants; and in the last named particular it is also contradicted by the testimony of Padre Viader, who certainly had better opportunities of knowing the truth, being on the ground; and it is contradicted by other documents in the same record or *espediente*, which being a part of the same transaction ought, with propriety, to have been brought in.

The true nature of the transaction by which the Pulgas came into the occupation of the Royal Hacienda in 1815, and passed back into that of Argüello in 1820, or '21, is explained and proved in so many authentic ways, that this *exparte* and unsanctioned representation cannot be held to prove anything in relation to it. Even Martinez recollected to have heard of the transaction at the time. In one matter, however, this document corroborates all the rest, namely, that after the removal of the King's cattle from the Pulgas, Argüello "*remained in possession of the Pulgas, and kept it.*"

6. A report made by Captain Don J. D. Argüello in 1796, to the Governor of California, concerning the foundation of the Government (or Royal) Rancho then founding at Burriburi.

This document does not call for comment. It proves nothing relative to the subject in hand. Even the remote inference attempted to be drawn from it (namely, that at the time of it, Argüello did not dispute with the Mission of Dolores, the privilege of pasturing its sheep on the northern end of the Pulgas,) is negatived by the corrected (and correct) translation of the instrument.

7. The will of Don Luis Arguello.

This document can be produced to nothing, unless to argue a negative, viz.: that as Don Luis made no express testamentary disposition of his real estate, consequently he owned none; consequently he didn't own the Pulgas.

But I should rather argue from it, that his purpose was to have his real estate to descend according to law; inasmuch as it would vest by law in his children, and he did not wish it to take any other direction. Now to infer, that because he didn't direct his estate to descend to others than the heirs of his body, he did not consider himself possessed of any estate, would be a very forced conclusion, under any circumstances; but especially where we have so many proofs that he did consider himself owner of the Pulgas. Padre Viader declares he claimed and held it in 1827, and only by his permission could the Santa Clara Mission pasture its sheep on its southern end. Osio shows the same, and most decided acts of dominion and claim of ownership to the time of his decease. Hence we are hardly warranted in concluding that on his death bed he repented him, and intended by mere silence to renounce for his heirs what he had so long claimed for himself. The officers who probated his will in 1834, do not seem to have drawn the inferences from his silence in this particular that the government and contestants now seem disposed to do; neither does it seem to have operated either on the executor of the will, or the mother and tutrix of the children, to induce them to forego their claim, or hinder them from boldly asserting it, before the same officers as those who had probated the will. Moreover, the occupation of land is *prima facie* proof of ownership of it; and as it seems by this will that Argüello occupied the Pulgas, since he makes disposition of his cattle on it, the inference cannot be drawn from it that he was not the owner of the Pulgas. Again, in the residuary clause, or rather the clause making the residuary devise, the word translated "*goods*," which with us is not usually applied to real estate, in the original is "*bienes*," which signifies *property*, and is applied to fixed as well as to personal estate; so that, when Argüello devises the residue of his *bienes*, and is at pains to declare that this is intended to include his moveables, we may rather infer that he had unmoveable property also, than the contrary.

The only persons, however, who can be interested in a will, are the legal heirs, the devisees and the creditors: and as the latter, in this case, are all paid off, and the former are all agreed as to the meaning of the will, and their respective rights under it, I think it an unnecessary labor for this Board to enter on an interpretation of it. (The remote inference, moreover, attempted to be drawn from the will, is more than rebutted by the recital in the mortgage, which we have introduced as rebutting testimony.)

This, then, is the testimony adduced by the Government and contestants; for the document importing to be a grant of the Cañada Raimundo, to Dn. Juan Copinger, which is produced, is no evidence against our claim; because, if the Cañada belonged to us, it was not competent for the Government to grant it to him.

The depositions and documents, then, that I have been commenting on, are the testimony adduced by the Government and the contestants, I had almost said, against us: but really there is *nothing*—nothing worth the breath to enumerate the different items—adduced *against us*. No one, indeed, who may have noted the progress of this case, but must be astonished at the meagre showing of the opposition to it, in contrast to the promise of the proclamation. But the fact is, there was nothing to show; they calculated, I know, because it was early developed, that it would be made

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to appear that this was the Royal Rancho, and the Arguellos only used it for their own cattle, by virtue of being Commanders of the Presidio, and hence having the power in their hands. This prospect presently faded away, and then, Padre Abila's report being discovered, it occurred to them, that it might have been a *Mission Rancho*, instead of a Royal one, and hence that Arguello was not there at all; that his ancient occupation was all a fiction. These were the only points they could rely on, and these have utterly failed them; because the opposite of all they supposed is established. And, indeed, if it had not been, by the testimony adduced by us, I should have contended, as I do contend, that it was by the testimony adduced before Governor Castro, now too late to review. It is established by that testimony, and also by parol before the Board established clearly, without equivocation or doubt, that from some time in the last century, the Rancho was in the exclusive possession of Don José D. Argüello; that about 1814 it passed from his possession, by tradition, to his son Luis, and that it was by his consent, by arrangement with him, that then the Government cattle were permitted for some years to pasture there. Hence, that in no period of time has it been either a Mission Rancho or a Government Rancho; but since its occupation, at a period not fixed, but certainly reaching into the last century, it has been in private occupation. It is one of the three or four tracts in populated California which only never were seized by the Missions. The only document that has even an appearance or intimation of any thing to the contrary of the facts thus established, is that of Padre Abila, and I have already shown why it is not evidence at all; certainly not evidence against us; its statements not received by the Government to which it was directed; and how it is contradicted by the direct testimony of other witnesses, less partial and more competent. The facts, in short, are proved, not only in a legal sense, but with a completeness that cannot leave a doubt of their truth in any discriminating mind.

I have endeavored to show that we had a right in a case like the present, to establish the *boundaries* of the tract by reputation. We unquestionably have to establish the extent of enjoyment and *possession*—I mean with reference to the establishment of boundaries. The former law agent seemed to think that in this view, we would not be permitted to show any kind of enjoyment or possession, except by actual enclosure and cultivation. But even the technical word *close* will apply to this tract, shut in by those four remarkable boundaries, making a complete demarcation of it. We are not limited, however, to showing occupation and enjoyment in these modes only. We have only to show the occupation and enjoyment of the tract according to the circumstances of the country, and the object for which the land was held. The whole business of the country was grazing There was no commerce. In the Spanish times it was not permitted, except through the annual visits of the king's vessels from San Blas; consequently there was no agriculture, except the little that was needed for home use.—After the Mexican dominion, and the policy was a little enlarged, there was some raising of wheat for the Russian settlements; and as we see by the testimony of Chaboya, the owner of Pulgas was not slow to avail himself of the trade. The grazing of cattle has always been the object of all considerable grants of land in California, and both by Mexico and Spain it was the branch of rural economy most encouraged in those provinces fitted for it. This is the sort of occupation and enjoyment, therefore, that we must look for here. As is said in 3 Greenleaf's Reports, 315, 319, "the lands being wild and uncultivated, the same

evidence of occupation, i. e., the same kind of occupation, cannot be expected which a cultivated farm would present; but that facts and conduct on the part of persons exercising acts of ownership and claiming possession, would amount in law to possession and seizin."

All the testimony, then, proves that the actual possession and enjoyment of the Argüello's extended over the whole tract of Las Pulgas, and was exercised in all parts of it. The house, for convenience, was built on the plain, convenient to the highroad, where any one now occupying the whole tract would undoubtedly build. But the cattle were grazed in the Laureles, the Cañada, on the San Francisquito, and by the Bay; timber was cut on the mountains; trespassers or intruders—the servants of the Missions, coming after cattle which should sometimes stray across the line, were kept off, except at the regular periods of separating them.*

Martinez had been bounded at the Alembique branch and on the hill-side, by the Pulgas, till recently one Charles Brown had got in there. It seems that in 1844, Charles Brown had not got in, for it was still at that time bounded by the Pulgas, as Martinez stated in his petition and grant of that year.

We have not testimony, and could not obtain it, owing to the remoteness of the period, of the *particulars* of the occupation prior to the restoration of the possession to Luis Argüello, in 1820-1. We have the general facts, and they are all-sufficient for our purpose, in the depositions of Sanchez, father and son, and Miranda, and the testimony of Galindo, Chaboya, and Peña. But we had also purposed to have brought the old man Nicholas Higuera, who had been manager of the farm in all its phases—first, on behalf of J. D. Argüello, then when the Government troops were there, and afterwards in the employ of D. Luis, but death snatched him from us before we had an opportunity to have brought hither his venerable gray hairs—an impressive illustration of the wisdom of those maxims of the law that relieve from strict proof facts of ancient date, and presume and assume everything in favor of ancient rights. We are satisfied, therefore, as to the general facts up to that time.

But of the extent of the occupation and enjoyment *subsequent* to the restoration of the rancho to Argüello, there is no lack of testimony. Hernandez had lived upon the tract; he knew where the cattle were driven for pasture, whence they were collected to be corraled and kept in subjection.

Osio was mayordomo, and performed those acts himself. All the witnesses testify and agree, that the extent of the enjoyment and possession was coëxtensive with all the rancho, as it was known in the Argüello family, and also during the time the troops herded there the king's cattle.

A pretended grant, which has been introduced by the Government, (for what purpose, or through what motive, the Government has thought proper to introduce it, is foreign to my intention to remark,) of the Cañada Raimundo to Juan Copinger, I do not consider in any sense as testimony against us; because, if the Cañada was a portion of the Pulgas, and the Pulgas belonged to Argüellos, then no grant of the Cañada to Copinger could affect our rights. I shall not, however, for that reason, pass it without remark.

The petition for this grant is not conformable to law, which requires the petition to be sent to the Governor. It is directed to the Prefect; and he is begged to report in favor of the grant.

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*The law agent, Mr. Howard, before commenting on the extent and kind of occupation there had been on the Pulgas, evidently had not informed himself of the facts, since the proof is altogether at variance with his statements.

No report, however, appears; and in fact how the petition got from the Prefect to the Governor is not explained. As far as appears, no information or advice was taken by the Governor before issuing the concession. The Governor alludes certainly, in the concession, to a report, or informe, of the Prefect; but if there had been a report, it is extraordinary that it does not appear. The concession, it will be seen, is written on the same paper as the petition, and if there had been any intermediate action between the petition (thus addressed to the Prefect) and the concession, it is remarkable that it should not intermediately appear. From anything that here appears, therefore, the concession was issued without the Governor taking the usual precaution to inform himself of the facts of the case. Even if the Prefect had reported, his locality was at San Juan Bautista, near a hundred miles hence, and the information he could give would not be reliable like that which would be furnished by the local magistracy. The decrees of Governor Castro, therefore, in 1835, beside being older in date, were a determination, on much better information than this of Alvarado, even supposing him to have had a report from the Prefect. Moreover, there is no pretence that in this proceeding Doña Soledad, or Estrada or any one representing the minor Argüellos, was heard; of course, their rights cannot be prejudiced by it. In the proceeding in the matter of Alviso's petition for the same valley, all the parties were heard; in this instance, not.

Again, there are abundant circumstances to show that this grant, or assumed grant, has never been adjudged as against the Argüellos. Besides having made without the customary information and advice being taken, it has been from the moment that it was heard of by the Arguellos, denied as rightfully given, or of any binding force on them; and no magistracy or functionary whatever has assumed to affirm or recognise it. On the contrary, in 1844, Martinez still describes his land, as bounded by the Pulgas, tho' the Copinger title was then four years old; and Micheltorena, after investigation had, describes the tract of Martinez, both that he had before, and the extension now given him, to bound on the Pulgas.

If we come, however, to the concession itself, we find it only professes to give to the *boundaries of the Pulgas.* Before Copinger then, can claim anything under the concession, the boundaries of the Pulgas must be fulfilled; not the boundaries expressed in any particular despatch or document, but the *boundaries of the Pulgas Rancho.* If we take the boundaries of the Pulgas Rancho, then, for what they are proved to be and to have been from time immemorial, *nothing can go under this grant;* and if we should even allow that by the fraudulent pretended act of measurement the Pulgas had acquired new limits, there could be little for the Copinger grant beside the slope of the sierra; because, as their witness Flores shows that measurement went to the Monte Redondo, within two or three hundred varas of the mountains, and their witness Martinez (Maximo), that the Alembique creek continued still to be a boundary. I do not lose sight of the fact, that Martinez attempting to testify to his pretended measurement, describes one line, which must have been about the middle of the ranch, that did not extend quite into the Cañada. The portesuelo is a place frequently mentioned in this testimony. It is where the house was in Richardson's time, and which is shown in Simol's testimony, and as is the fact, near about half way, by the high road, between the two creeks. Here then, according to Martinez, they run a line a league long, which reached near, not quite, into the Cañada. What kind of measurement was this to ascertain boundaries? To fix outside limits? Does he mean they undertook to bisect

the rancho both ways; to cut it in two latitudinally as well as longitudinally? If so, which end remained the Pulgas? The feet and legs, or the head and belly? The San Mateo end, or the San Francisquito end? Because it seems from his testimony, that at this point they stopped, made their marks, &c., and went away. And high time, too, for they had as much authority to divide the estate one way as they had the other, and when they had accomplished both, it was time to go. But as there has never been any pretence of an effort to halve the ranch between the two creeks, and this statement of Martinez is so opposed to that of Flores, and so inconsistent with his own declarations in other particulars, I think that his memory must have been here at fault. First: Flores declares the measurement was to the Monte Redondo, and to a hill up the San Francisquito creek, whilst Martinez makes the last line run to have stopped a league south of the Monte Redondo. Next, Martinez himself declares that the same magistrate who gave this pretended measurement, only a few weeks afterwards, having the documents and evidence before him, declared the Alembique creek to be a boundary of the Pulgas; and again, as late as 1844, exhibits and describes not the Alembique, *but another mountain branch of the San Francisquito*, FARTHER SOUTH, as the common boundary between him and the Pulgas. It follows then, that Maximo's recollection on this point must have failed, or else that he himself attached little importance to this fraudulent proceeding called a measurement, for he certainly had not, as late as 1844, abandoned the idea that his own rancho, beginning as he describes it at the very source of the creek, in the sierra, was bounded (not cornered) on the north by the Pulgas; and even in his testimony here, his unpremeditated reply to the whereabouts and boundaries of his rancho, was, that it bounded with the Pulgas, and only on second thought that he recollected that Charles Brown had now come to be his adjoining neighbor. This slight circumstance, shows how strong the habit on him was to consider the Cañada Raimundo as a portion of the Pulgas. Look at his map of '44; look at his declarations, both the voluntary and the involuntary: "I live at my rancho," &c. "They pastured on the Pulgas, on the laurels," &c. "I have known the Alembique," &c.

When the time comes, however, we shall hope to convince even Maximo, that the Alembique is *not* his boundary; that he has described his limits better when he says, "I reside between the creek of San Francisquito and the Matadero. Las Pulgas is at the north of me." That is where he does reside; he resides south of the southern branch of the San Francisquito, which is the main branch; and he errs, not only against all the rest of the world, but against himself, when he afterwards undertakes to say that the creek does not take its name till after its various branches unite. He resides, and has for near twenty years resided far up this branch, which he both here in his testimony, and in his map of 1844, denominates the San Francisquito. In due time, we shall hope to show him that the *San Francisquito* is his boundary; that San Francisquito, on the south side of which is his house, and north of which he never thought of going, till the spoliation of the Pulgas having began through the pretended grant to Copinger, he thought it as well also to claim to another more northerly branch.

In the meantime, having shown the discrepancy between Maximo's statement of the lines run in this spurious act of measurement, with his own other acts and declarations, and with the testimony of Flores; I submit that even if it be admitted that new boundaries were established for the Pulgas rancho by this measurement, we should

at least, be entitled to go to the extent of *all the limits*, and the largest that they have shown to have been run; and if Copinger have any land he must take it beyond the Monte Redondo and the Alembique.

Again, this grant of Copinger's has never been approved, not even referred to the Assembly. I don't think that this fact necessarily vitiates a grant; far from it. It was a neglect of the governor, not of the grantee, and I don't think that this necessarily impairs his right as against the government. But as between two grants of the same land, that which has been approved must prevail over that which has not; this would be the case when they were of equal date; possibly even where the approved one was junior: but certainly where the approved one was senior; if for no other reason, because the first one by the approval had become definitively valid: i. e., beyond all control of the Government, and the title and interest of the Government completely divested. Even in case of two patents for the same land, the one showing the oldest equity, prevails. But there has never been a period in the history of California, that this Copinger title could have passed the Assembly; because there has never been a period when there were not members in it who knew, and would have defended, the rights of the heirs of Luis Argüello.

But again, if this Cañada were not grantable in 1835, because it was private property, and not public domain, how came it to be grantable, how could it be grantable, in 1840?

In 1835, the Government disclaimed the ownership of the Cañada, and declared it to be a vested inheritance; disclaimed the right to grant it, even when solicited by one of its own children, who had long served in the career of arms, and deserved, and was entitled by law, to the bounty of his country. How came this inheritance to be divested, then, and the land turned to public domain? Who was competent to divest, or to consent to the divestment of the inheritance of these minors? Not Estrada, certainly, who was only the executor of the will. If any one, surely the mother; the natural and legal tutrix of her children. She did not, that is certain; but the moment she was aware of the attempt to do it, put in her indignant protest. But even she was not competent; had she been so disposed.—Their inheritance was under the protection of the law, as long as they were in a state of pupilage; and the law nor its ministers were competent to take away or abate their rights.

This assumed grant to Copinger, then, neither decreases nor enlarges our rights. When the grantor has nothing in the object embraced in the grant, of course the grantee takes nothing; and this instrument, therefore, can have no other weight in the case, than as an expression of an uninformed idea of Alvarado that the Cañada was public domain. Against this unfledged opinion of Alvarado, I put the judgment, founded on ample hearing, made by Castro, in 1835; the testimony of the numerous witnesses who then and have since declared. Against this hasty act of Alvarado, I put the well established facts of the case. Can it require any argument to show, that a grant of 1840 cannot affect prior subsisting rights? Why is this instrument here, then? What has it to do here? We claim under a right of sixty years standing. What possible effect to invalidate that right can this proceeding have, the earliest stage of which is in August, 1839?

In a former discussion of this case the question was asked, whether we claim that Luis Argüello had a right in the Pulgas before his alleged grant of 1820. We do. We do not know the nature of it, nor whence derived-- I mean its original derivation; but we know it

was sufficient to vest the property. We have the judgment of Sola to that effect, and his judgment cannot be impeached now. The Government receiving from Argüello the use of the land by way of a loan, and afterwards restoring it to him, argued such a right in him as the Government recognised to be paramount; and even if the power of Sola to *make a grant*, i. e., to *create a right* could be successfully questioned, his power to acknowledge and recognize and act upon a *pre-existing right* could not be questioned; and unless we knew the nature of that pre-existing right thus acknowledged by him, we have no means of impeaching it; and as we have no means of impeaching it, we are bound to suppose that Sola judged it rightly, and be content with his judgment. My opinion is, that occupation of the ground for so many years by metes and bounds, by mere *consent* of the government, whether that consent were positive or only tacit, was sufficient to give a title that Sola would have respected. If, however, that was not sufficient, then we may suppose he had a grant in terms from Borica, or his predecessor, and if that was not sufficient, then from the Viceroy; or that, still lacking validity, from the King himself. Whatever was necessary, we are bound to suppose he had, since the government then so adjudged, and we have no means of impeaching that judgment, or what it was based on.

I have contended that forty years was the period of immemorial or just prescription, in the Spanish law, and would confer a title to anything which could lawfully be the subject of private dominion—not of regalia, not of rights peculiar to the crown, not to those things of the crown which by law could not be alienated; but of anything, even of the crown, which was held for alienation, for distribution.—To this point, I content myself here with a reference to the chapter on prescription in any edition of *Febrero*, and especially in the *Mexican Febrero*.

But whether prescription runs in this case or not, one thing is certain, that there is not under the Spanish or any other system of jurisprudence, any mode of *divesting an inheritance* except by process of law. The crown cannot recover any more than an individual, without process of law. There are plenty of instances in the history of Spanish dominion in America, when the Crown being distressed for means, sent into the flourishing colonies of America to institute an inquisition into the tenures of land, for the purpose of a money composition with those who might be found holding without title. But this was not attempted without due process and investrgation, with citation of the parties; an inquest of office, in short. So also in England, the king, and in our own country, the Government, be it State or National, is put to an inquest just as an individual to his appropriate action. Now, that Luis Argüello, in 1820 or '21, (not now to go farther back,) by some process went into the undisputed and exclusive enjoyment of the Rancho de las Pulgas, in all its claimed extent, and so continued until his death; and that, he dying, his succession went into like full enjoyment and possession, by descent cast, is so largely proved, that it is tedious to enumerate the sources of the evidence. Now, by what process of the law have they ever been divested? There was a process certainly, in the matter of the Alviso petition, but that confirmed their rights to the Cañada, instead of ascertaining it to be ill-founded, and every subsequent investigation that has taken place, it has gone to establish the justice of that decision.

So the subsequent proceeding which resulted in the concession of the 26th November, 1835, was instituted for the purpose of a more formal recognition of these rights, not only to the Cañada but the whole tract of Las Pulgas.—

Now, could the governor or any one else take advantage of the proceeding thus instituted for the purpose of confirming a right, and pervert it to the spoliation of that right? If he could, can his silence be construed into such an intent? If he intended his decree of the 27th November to extend only to the Cañada, it would of course leave the Cañada in the same condition it was before, viz., in the possession of the Argüellos, with their right to it adjudicated and declared in the previous decision; that is, this document of 27th November could not take away any right—nor does it profess to. It professes to confirm certain rights, but does not propose to take away any.—Therefore, even if it could take away any, it does not, but leaves all that it does not confirm in the same situation it was. If it does not, therefore, confirm (though I think it does) our right to the Cañada, it does not impair it; but leaves it with the rights supposed by the ancient possession, confirmed by the act of Gov. Sola, recognized by Figueroa in his grant to Martinez, declared by Estrada, proved by the Council, and Commissioner of San Francisco, adjudged by Governor Castro, reasserted by Estrada, proved by three competent witnesses, established by the concession of 26th November, made definitive by the approbation of 10th December.

But this paper, like all the rest, recognizes our right to the *Rancho de las Pulgas;* even Copinger's grant does that. So that it all comes back to the original question of parcel or no parcel, and no misdescription, whether intended or otherwise, can affect the fact in that particular; which would be simply a matter of proof, if the adjudication of Castro in the matter of Alviso had not put it on higher ground. The misdescription, or description, if you choose so to call it, is not proof; *i. e.*, it is not proof of the boundaries of the Pulgas. If it be proof of the boundaries to which the governor then intended to grant, it would only go to show that he held the ownership of the Cañada to be sufficiently ascertained and recognized in his previous decree and judgment in the matter of the Alviso petition, and can in no manner be construed into a negation of that judgment, or into an intention to abreviate the rights of the parties as by it ascertained, or to the whole *Rancho de las Pulgas*, as the same had been shown to exist, or the whole extent of their ancient possession, which it declares and recognizes. I wish to be understood in reference to the effect of this decree in the matter of Alviso's petition. I do not say it operates as a grant, as conferring a right; but it stands on higher ground, as a recognition and adjudication of a subsisting right, and as such it is unassailable and unrepealable. Before that time, as I have shown, the parties could not have been deprived of their inheritance, without process of law; without an inquest. This was that process; that inquest: which ascertained, not that they could be deprived of, but, that they rightfully held the inheritance: and it seems to me absurd to assume that that inquest was not final against the Government, which instituted and conducted it, and is not against all successors to and claimants under that Government.

To show that the *Rancho de las Pulgas* is *our property*, we show a continuous possession, with claim of title reaching into the last century, and passing through three generations; an act of the Government in 1820 or 1821, constituting an acknowledgment of our paramount right; the proceedings instituted on the petition of Estrada, the executor of the will of Luis Argüello, in behalf of his heirs, ending in a declaration of our title by the Governor, and the approbation of that declaration by the Deputation. To show that the *Canada Raimnudo* is *parcel of that rancho*, we offer proof of enjoyment of the Cañada as such component part, and proof of

its designation as such by the whole community ; the report of Padre Viader, and the entry in the Land Book of 1827-28 ; the description given in the grants of adjoining lands of Martinez, in 1832-33-34 ; the declaration of Estrada, and reports of the Council of San Francisco and the Commissioner of Dolores, and the judgment of Governor Castro in 1835 ; the renewed declaration of Estrada, the testimony of three competent witnesses, taken by the Government, and by authority of law, the renewed declaration thereupon by Governor Castro, and the approbation of the Assembly in the same year ; the descriptions of the boundaries of adjoining grants of Martinez, in 1844, and the testimony of our witnesses, Galindo, Chaboya, Peña, Hernandez, Suñol and Forbes, and of the Government witnesses, Flores and Maximo Martinez, taken before the Board.

ARGUMENT

BY HORACE HAWES, ESQ.

ON THE LEGAL CHARACTER AND EFFECT OF THE PROCEEDINGS AND JUDGMENT IN THE MATTER OF ALVISO'S PETITION FOR THE CAÑADA RAIMUNDO.

[*I am glad to acknowledge my obligation to* MR. HAWES, *for his very learned, able, and convincing Argument to this point, and for his permission to lay it before the Board and the Public in connection with my own Brief.*]

In August, 1835, by reason of an application which was made by José Antonio Alviso for a grant of the tract of land known as the Cañada Raimundo, an inquiry was instituted to whom this property belonged. Upon the presentation of Alviso's petition, information in regard to the land was required from the Ayuntamiento of San Francisco and the Commissioner of the Mission of San Francisco. Among other things it is stated in this information that the Cañada Raimundo is understood to be the property of the widow and heirs of Don Luis Argüello, deceased, and to pertain to the Rancho de las Pulgas.

After this information had been received, a transcript of the proceedings (*traslado*) was in the usual judicial form ordered to be delivered over to Doña Soledad Ortega de Argüello for the term of fifteen days, in order that she might within that time allege what she might deem proper respecting the right of herself and family to the land in question. She said that the property was theirs, and she constituted José Mariano Estrada, who was executor of the will of her deceased husband, to represent her and her children in this proceeding before the Governor. The Attorney thus constituted puts in a formal answer in behalf of the Argüello family, in which he represents that they were the proprietors, had been in possession of the property since 1795, and that the muniments of title which they held from the Government had been lost.

After all that had been alleged and proved in the information presented to the Governor, all in the solemn and formal mode of a judicial proceeding, he pronounced the decree that the land petitioned for by Alviso was not subject to the disposition of the Government—

that it was the property of the widow and children of the deceased Don Luis Argüello, and ordered that the proceeding in the case should be archived.

Two questions are presented by these proceedings.

First: Whether the Governor was competent to entertain them and pronounce the sentence which he did.—And

Second: What is the precise effect of the decree then made with respect to the question now before this Board.

The subject matter was the Cañada Raimundo; and the question presented was whether it belonged yet to the public domain, or had been previously granted as was alleged to the claimant.

Now, I lay down the proposition that the Governor, or Jefe Politico, had *exclusive* cognizance of this subject, and that even if the same question had arisen as an incident in a proceeding before the civil tribunals, it must have been remitted to the Governor, who was invested with the jurisdiction *administrative* in such cases, for his decision.

In all that I have to say on these questions, I shall confine myself to the principles of Mexican jurisprudence and the division of the powers of Government as recognized in that Republic. These principles will be found to differ widely from those which are established in the United States. Particularly it will be observed that the administrative authority of the executive is more extensive, and the judicial authority more restricted than in the United States.

The author of a work entitled *Derecho Administrativo, Don Teodosio Lares*, a distinguished Advocate in Mexico, lays it down as an established principle (p. 66) that the subject of concessions and authorizations is a matter of administrative jurisdiction; that is, these are subjects cognizable before the proper agents and officers of the public administration.

On p. 67, the same author has the following observations: "In grants which convey an exclusive privilege the question that may be raised whether such a privilege has been granted or not, would undoubtedly be cognizable by the administrative authority."

Again: (p. 60—1.) "The acceptation of the word *right* (derecho) is invariable in the administrative science. But we have to consider two species of rights—*primitive* and *acquired*. We call that a primitive right which is inherent in the quality of proprietorship of any thing fixed or moveable, corporeal or incorporeal, or the quality of native or citizen. In every civilized Government it is prohibited to touch the *rights* of citizens, *nacionales*, in any discretional mode. If the common good requires that these rights be attacked, it is necessary to accord the *contentious recourse*. Thus, then, every administrative act which destroys, modifies, or alters these rights, is an act which may be reclaimed by the contentious recourse, (via contenciosa.) The acquired right emanates from administrative acts purely discretional. Although the administration may refuse the favor solicited, once conceded, the object of the concession, be it corporeal or incorporeal, comes to be the property of him who obtained it. It is a new right which has grown out of the concession, and this acquired right is as worthy of being respected as any primitive right.

Exceedingly important is the distinction between the primitive and *acquired right* which we have established, in order to determine the *competency* of the authorities which must measure or determine their extent, (apreciarlos.) The latter, which emanates from administrative acts, must frequently need an interpretation or application, and it would be contrary to the true principle of the division of powers to commit these acts to the civil tribunals.

Again, (p. 151,) the necessity of an administrative jurisdiction which shall take cognizance of, and decide upon

every administrative matter that is contentious, (lo contencioso-administrativo,) is founded in the separation of the judicial power from the executive. In all countries in which, as in ours, is sanctioned the principle of the division of powers, legislative, executive, and judicial, and where is recognized the fundamental truth that two or more of these powers never can be united in one and the same person or corporation, the administrative *jurisdiction* must be also recognized, because it is derived naturally from the executive power, which is its foundation and origin. The administrative power, the administration, is the executive power. If there must be a reciprocal independence between the executive and judicial, it is a necessary and inevitable consequence that there must be between the administrative and judicial power. The indestructible foundation of the power to judge the subjects of the administration which become contentious *by the administration itself*, is necessarily found in the union of this power to judge (juzgar) *with* the administration, of which it is an integral part, indivisible and inseparable. It is impossible for the administration to exist without the faculty or without the power to judge its contentious subjects, for to take cognizance of and decide about the acts of the administration, is to administer; to administer corresponds to the executive power, and the executive power cannot be exercised by the judicial, as it would be if the judicial should take cognizance of administrative acts that become contentious.—The contentious administrative jurisdiction grows out of the *consequences*, the results, the interpretation of administrative acts. The tribunals have no power to *explain, modify, or annul* an administrative act, because in that case, they themselves would *administer*. The proceeding (juicio) contencioso-administrativo, *must* then pertain to the administrative jurisdiction."

Again, the same author says, (page 200,) that "the interpretation, explanation or application, of acts of the administration, produces a discussion or contention, and that the civil tribunals are wholly incompetent to take cognizance of this contest, which pertains *exclusively* to the jurisdiction of the administration itself—that the tribunals or ordinary judges cannot confirm or dis-affirm, add to or diminish, the authority, force, validity, or subsistence of an act of the administration; and that this proposition is fundamental, that it is based upon a principle of social organization which tends to the preservation of the equilibrium of the powers. which permits on the part of the one with respect to the other neither doubt nor examination; that (p. 210) when questions of the character specified as exclusively cognizable by the administration, arise as *incidents* in a cause pending before the civil tribunals, these tribunals must suspend their proceedings until the subject has been remitted to and passed upon by the proper executive officer. Many examples are given in which these incidents may arise, and among others (p. 213) is put the case of a litigation between two individuals about property, and one of them founds his right in an original sale of national property, which sale or adjudication must of course have been made by the competent agent of the administration. The declaration whether such an adjudication or sale has been made, and its terms and extent corresponds to the administrative authority, to whom the subject must be remitted for its determination, and in the meantime the civil judge must suspend proceedings.

In all these contentious matters, cognizable before those who exercise the administrative jurisdiction, the parties interested, that is, those whose *rights* are affected, must be cited and heard,

as fully, though not with precisely the same formalities, as if they were pending before the ordinary civil tribunals. The persons who exercise this administrative jurisdiction are the administrative agents or functionaries placed at the head of the executive government in each of the demarcations or political divisions of the territory of the nation, as the author cited shows, (p. 378,) as governors and prefects, each having cognizance of the matter which by the laws pertains to his functions.

In the case under discussion, the Governor, in the exercise of the powers given him by law to grant lands to citizens who wanted to occupy or cultivate them, found it necessary to inquire whether the tract called Cañada Raimundo pertained to the public domain, which involved the inquiry whether it had been previously granted or separated from the property of the nation. If it had been so granted or disposed of, it must necessarily have been by an administrative act. The inquiry was one for which, according to the authorities already cited, the civil judges were wholly incompetent. It was within the jurisdiction of the Governor, and he had exclusive cognizance. After the official information asked for had been received through the usual channels, it resulted that the heirs of Argüello claimed to own this same land in virtue of an ancient grant to their deceased father, and immemorial possession under it; the grant itself, as was represented, having been lost; a circumstance by no means strange, considering that forty years had elapsed since it had been made. Here there was a private right set up, with which a proposed act of the administration might conflict, and it was a right of the highest order, that of the *proprietor*. "The right of a *proprietor*," says the author I have cited, (p. 158) "is the most extensive that is known. In order to comprehend all the cases of the administration, it may be defined *jus utendi et abutendi; aedificandi, non aedificandi; fruendi, non fruendi.* Thus, then, every deterioration, every injury of this absolute right, every prohibition to use, or to enjoy, all damage perpetual or temporal, accidental or voluntary, heavy or light, great or small, must be considered as an attack upon the right, and every administrative act which attacks it is contentious. If the administration cannot work (p. 146) without conflicting with *rights*, be they primitive or acquired, or if it pretend to cause them any injury, great or small, the matter instantly becomes contentious, and recourse is given before the administrative tribunals." Recognising these principles, and his indispensible duty, the Governor orders a formal citation of Doña Soledad Ortega de Argüello, who was the guardian and representative of the children of her deceased husband. A transcript of proceedings is given her, and a term of fifteen days assigned to present her allegations. She empowers an attorney, in due form, whose answer, with the power annexed, is added to the *expediente* After all this deliberate, formal, and solemn proceeding, the Governor's sentence is pronounced and recorded upon the identical question now being resuscitated before this Board. It is, that the Cañada Raimundo *is not* a part of the public domain, and cannot consequently be disposed of by virtue of his administrative powers, but that *it is* the private property of the Argüello family. No one was a party here but the Government, and the then and present claimants, the Argüellos. Alviso was not and could not be a party, because he had not nor pretended to have any right to the subject matter of the *juicio*. He was applying for a favor, which was discretionary on the part of the Government. He was, however, bound, as all the world would be, who might set up any right acquired by any subsequent administrative act, or which

is the same thing in this case, who might claim under a subsequent grant from the Government. Here, then, your Honors of this Board find a place to rest. To what end have you patiently, and with the most anxious desire to do justice, listened to so much proof and argument about the Cañada Raimundo? To the end, certainly, that you may know and determine whose property it is - that of the Government or the Argüellos. That was the question before the competent administrative tribunal here in 1835, and it is decided. The decision is clear, and nee is no explanation. The only question is, if you will review and reverse it, after a lapse of eighteen years and a change of sovereignty in the country. If you undertake the task of reforming all the administrative and judicial acts done under the former government, no matter under what pretence, your labors will not be soon concluded; and you have just as good a right to review the decrees of the judges under the former government, as of the administrative agents. I believe you will have no disposition to do either.

I will now inquire,

2d. What is the precise effect of the decision, order or decree, in question? and I say and will prove that it is *res judicata et pro veritate habetur*. We have already seen that the subject matter was one cognizable before the Governor, who *ex officio* exercised the administrative jurisdiction. Now, the determinations and decrees of the administration have the same force and effect both as respects their being *res judicata*, and authorizing immediate execution, as the sentences of the civil tribunals. It will of course be understood, that the principles of English law have no place in my argument, which is wholly based upon the jurisprudence of Mexico, and the principle of the division of powers as recognized there—the jurisprudence and the principles which must rule this case.

"The *cosa juzgada*" (*res judicata*) says the author whom I have taken as authority, "is one of the principles eminently conservative of social order. Among the Romans this maxim was adopted, which has passed into all legislations, *res judicata pro veritate habetur*. It is not a universal truth, it is a relative truth—it is the truth with respect to the parties who have litigated," and, I may addd, it is the truth with respect to all the world who subsequently come to occupy the place of either of those parties, with respect to the *subject matter* litigated; otherwise the litigation might be renewed as often as the rights determined should be transferred to new parties, and strife would have no end. "The authority of the *cosa juzgada*, however, takes place precisely with respect to that which has been the object of the *juicio*, (the proceeding.) It is necessary that the demand be renewed about the same thing, for the same cause, against the same parties, and with the same quality."

All these requisites concur in the subject now before the Board. The thing in controversy is the Cañada Raimundo. The object of the contest now, as it was before, is to determine if the thing in question belongs to Government or to the Argüello family. The parties claiming title now, as then, are on the one hand the Argüello family, and the Government on the other. I set aside the Copinger claim, growing out of a grant in 1840. It is not even worthy of consideration, for whatever right he may have is derived exclusively from the Government subsequent to the determination which had finally and forever established the fact, that the Cañada Raimundo was not subject to its disposition.

The parties present themselves now in the same quality that they did in the case decided by the Jefe Politico, in 1835. The Argüellos then, as now, claimed in their own right, and the Government then, as now, claimed in

the only quality which it can possess, that of the administrator of the properperty of the nation. Then, what is the effect of this administrative decision? I repeat, it is *res judicata*, and cannot be questioned without an utter subversion of the firmly established principles of Mexican jurisprudence, and of the law of nations, as well as a violation of the treaty of Gaudaloupe Hidalgo. I have said that the decisions of the administration, where they are competently pronounced, have the same force and effect as those of the ordinary courts of justice; and this is a proposition so plain, that it never admitted of any questson among Mexican advocates. "It is never to be expected," says Lares, "that the judicial or administrative power will pretend, knowingly, to judge, *de novo*, the same cause, about the same thing, between the same parties, and with the same quality. The difficulties, without doubt, grow out of some error in the parties or the judges."

The same eminent jurist, after referring to several examples where the exception of incompetency might be interposed by the State before the civil tribunals, instances the case of suspension of payment, which he says is a defence essentially administrative; that is, raises a question of which the administration is alone competent to judge.

"But," he says, "if the exception of suspension of payment has been proposed in the name of the State before the judicial authority, and has been discussed and decided against the State, it is evident that the *res judicata* has fallen upon the question of suspension itself. In vain would the State allege that the tribunals were incompetent to pronounce upon a matter of which the administration had exclusive cognizance. The State might, by means of its agents representing it in the process, have interposed the exception of incompetency, and demanded the remission of the matter to the administrative authority: have, in fine, introduced the recourse of competency. All these means it had to defend itself, and prevent the judicial authority from deciding. If it has neglected these means of defence, and has succumbed, *it must pay homage as a simple individual to this fundamental maxim of human societies, res judicata pro veritate habetur.*

Again he inquires, and with the same result, "What shall be done if the decision has been pronounced incompetently by one of the authorities, judicial or administrative? Before indicating the solution of this difficulty, a solution which must repose upon a sound application of the principle of *res judicata*, we should observe that cases of great exaggeration must not be proposed, nor must we occupy ourselves about propositions merely ideal, as if the administrative authority should condemn one to death, or the judicial should order to suspend a minister of state. We have already said that it is not to be presumed that either of the authorities would knowingly undertake to decide a matter not pertaining to its jurisdiction. But if we may suppose that the judicial authority, through error or mistake, might undertake to interpret an act of the administrative which has taken place in the sale of national property; that it might undertake to decide upon the goodness or sufficiency of public works, and condemn the contractor (*empresario*) to do them over again; or to judge in those cases of which the law had deprived it of jurisdiction; we may likewise suppose that the *administrative authority* might condemn one who had dealt with the contractor of public works to pay him a sum of money, &c. In these and similar cases, what would be the effect of the res judicata, or thing adjudged by one of the authorities with respect to the other, to whose cognizance the same question is submitted anew by the same parties? We reply, that if the decision, incompetently pro-

nounced, is yet susceptible of being reformed by the superior authority in the order of the respective jurisdiction, it must be respected by the other power until it be reformed, and the latter must abstain from taking cognizance in the meantime. If the decision is in itself irrevocable, or has been confirmed by the superior authority, it will then have acquired the force of *res judicata* with respect to the other power. There was a demand, (a formal exposition of the matter in controversy,) a trial, (juicio,) a decision. The matter is concluded. The judge may have committed an error, but in the order of proceeding it is irrevocable. Because, although it is important that the order of jurisdictions be maintained, although it be true that the will of the parties cannot change it, and that the tribunals ought even *ex officio* to abstain from taking cognizance of matters not within their competency, it is also certain that the salutary principle which confers upon the *res judicata* an *omnipotent authority*, must be respected. It would be to no purpose that the laws may have regulated the hierarcal order of the different tribunals, that they may have determined the different recourses, and the terms within which they must be introduced, if after having run through all the grades and instances, after having exhausted the means of obtaining a reform of the decision, it were possible for the parties to present themselves *de novo* before the tribunals, alleging, *with reason or without reason*, the incompetency of the judges who had already sentenced.—Respect for the res judicata is the true bases of all judicial organization; and our legislation supposes the existence of this principle, even when it concedes the recourse of nullity for non-observance of the laws which regulate the proceeding. These same principles, these same considerations, and these same arguments, which have their applications among tribunals of the same order, operate with all their efficacy to maintain the effect of the thing adjudged by the administrative authority, with respect to the judicial, and reciprocally the effect of the thing adjudged by the latter, with respect to the former. If the tribunals could entertain a subject already adjudged by the administrative authority, the consequence would be that the latter in its turn would not respect the sentences of the judicial authority; it would intermeddle in proceedings already determined, and the constitutional limits between the two powers would be utterly confounded." Another and more decisive reason for all this is found in the fact that within a term fixed by law the recourse of nullity may be interposed against the sentence pronounced by a tribunal, administrative or judicial, incompetently.

If that term be allowed to pass, there remains no further recourse. But in the case before this honorable Board, the administration is questioning its own acts, its own solemn adjudications; for the United States succeeds and stands in the place of the former Government, and is concluded by the decision in question, in the same manner and to the same extent as the former Government. It is unnecessary to speak of Copinger. He has no standing in *judicio*, and before the tribunals of the former Government, judicial or administrative, would have no claim even to be heard. He procured a grant without any of the usual formalities, in direct contradiction to the *res judicata*, from an officer of the Government which had been solemnly adjudged to have no right to dispose of the property granted, in conflict with the rights of other parties which had been acknowledged from time immemorial. Now, "the administrative authority does not accord authorizations or grants without saving the rights of third persons *This reserve exists and is understood in every grant, although it be not expressed.* Because it must never be

supposed that the administration by its acts intends to permit or commit a crime. Thus the concession which proves injurious to a third person, presupposes an agreement between the latter and the grantee, which a judicial examination will prove does not exist, and the execution, therefore, of the administrative act, must be suspended until the consent of the proprietor is had, a circumstance essential to the perfection of this conditional act. The tribunal will not suspend the right of an administrative act which is com plete, full and perfect. But the act which prejudices third persons, is *con ditional.* Its execution depends upon the verification of the condition; the default of which is revealed by the reclamation of a third party." This is the condition of those who obtain snap judgments or decrees from the Governor, in order to appropriate to themselves what belongs to others—who attempt to despoil the widow and the fatherless children.

We see, then, that the question now before this Board, so far as regards the Cañada Raimundo, has been decided by competent authority; that the business is concluded, and even though the authority by whom this solemn decree was pronounced may have erred, yet, in the order of proceeding, it is irrevocable.